TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 295 56.

THE ROGERS PARK WATER COMPANY, PLAINTIFF IN ERROR,

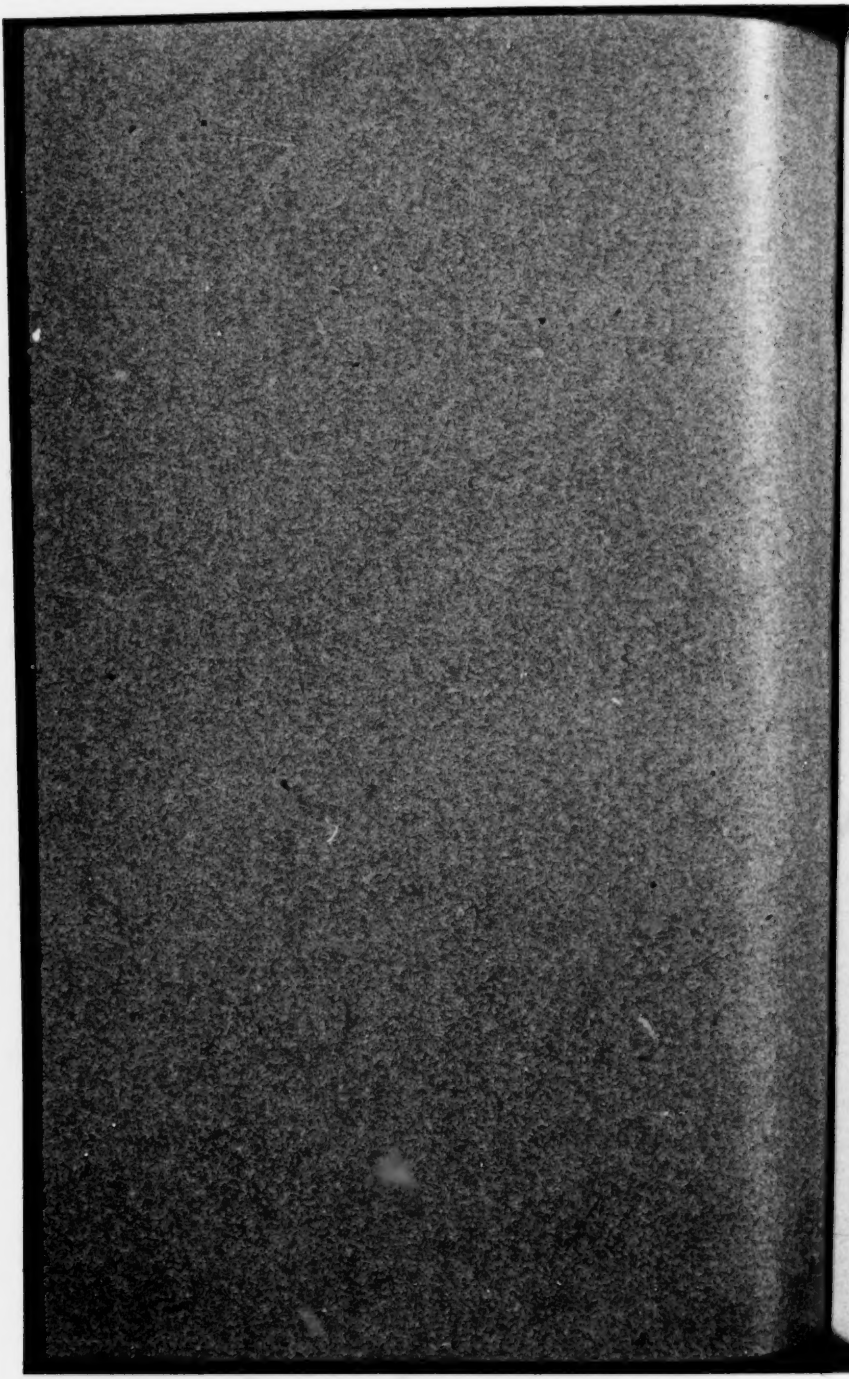
vs.

JOHN B. FERGUS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED MAY 18, 1900.

(17,407.)



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INDEX.

	Original.	Print.
Assignment of errors	*a*	1
Citation and service	*c*	2
Clerk's certificate as to copy of citation	*d*	2
Writ of error	*e*	3
Clerk's certificate as to copy of writ of error	*g*	4
Clerk's certificate and return to writ of error	*h*	4
Caption	1	4
Transcript from circuit court of Cook county	2	5
Caption	3	5
Summons and return	3	5
Alias summons and return	4	6
Petition for mandamus	5	6
Order for summons	11	10
Appearance for defendant	12	10
Demurrer to petition	13	10
Answer	15	12
Plea or traverse	41	25
Demurrer to pleas	44	27
Amended answer	49	30
Amended answer	75	44

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1899.

	Original.	Print.
First demurrer to first answer	99	56
Second demurrer to first answer	101	57
Demurrer to third answer	102	57
Pleas	103	58
Joinder in demurrer	106	59
Replication	106	60
Verdict	109	61
Judgment	110	61
Order for alias summons	111	62
Order extending time to plead	111	62
Order overruling demurrer to petition	112	63
Order requiring defendant to rejoin to petitioner's plea	112	63
Order granting leave to withdraw plea or traverse, &c	112	63
Order granting leave to file copies of pleadings, &c	113	63
Order on defendant to plead	114	64
Order sustaining demurrers to answers	114	64
Order sustaining demurrers to answers, &c	115	64
Order extending time to file bill of exceptions	116	65
Bill of exceptions	116	65
Testimony of John B. Fergus	117	66
Ordinance prescribing water rates	119	67
Defendant's Exhibit 1—Application for supply of water	124	70
2—Ordinance to provide water supply, &c., November 12, 1888	127	71
Testimony of C. H. Ceperly	141	79
Defendant's Exhibit 3—Agreement between Hervey E. Keeler and the Rogers Park Water Co., January 31, 1889	144	81
4—Letter of A. W. Craig to H. E. Keeler, August 21, 1889	148	83
Testimony of William Wyatt McGaffey	149	84
Jesse B. Barton	159	89
Defendant's requests for instructions	160	90
Judge's certificate to bill of exceptions	163	92
Stipulation as to use of original bill of exceptions	164	92
Bond on appeal	165	92
Clerk's certificate	166	93
Assignment of errors	167	93
Order taking under advisement motion for extension of time in which to file briefs	169	94
Order extending time in which to file briefs	170	94
Order taking under advisement motion for extension of time in which to file briefs	171	95
Order taking cause under advisement	172	95
Order denying motion for extension of time in which to file briefs	173	95
Judgment	174	96
Opinion	175	97
Order denying petition for rehearing	183	102
Petition for writ of error	184	102
Bond on writ of error	186	103

a In the Supreme Court of the United States.

ROGERS PARK WATER COMPANY, a Corporation, Plaintiff in Error, vs. JOHN B. FERGUS, Defendant in Error.	Writ of Error to Supreme Court of Illinois.

Assignments of Error.

Now comes the plaintiff in error, Rogers Park Water Company, by N. A. Partridge, its attorney, this 14th day of April, A. D. 1899, and shows that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

Said supreme court of Illinois erred in deciding that the authority exercised under the State of Illinois by the city of Chicago in passing the certain ordinance of the fourth day of October, A. D. 1897, was valid, and in rendering its said judgment in said cause upholding the validity of said authority, which said authority and the exercise thereof was repugnant to the Constitution of the United States.

II.

Said supreme court of Illinois erred in deciding that the said ordinance of the city of Chicago, passed on the fourth day of October, A. D. 1897, was valid and erroneously rendered judgment in favor of the validity of said ordinance, which said authority and the exercise thereof was repugnant to the Constitution of the United States.

b III.

Said supreme court of Illinois erred in deciding that the rights and privileges conferred upon said plaintiff in error as assignee of the grantee of said ordinance passed on the 12th day of November, A. D. 1888, by said village of Rogers Park, were not vested rights, and erroneously entered judgment against said rights and privileges of the plaintiff in error, which were specially set up and claimed under the Constitution of the United States.

IV.

Said supreme court of Illinois erred in not overruling the demurrer interposed by the defendant in error to the third answer of the plaintiff in error.

V.

Said supreme court of Illinois erred in not reversing the order of the circuit court of Illinois awarding a peremptory writ of mandamus in favor of the defendant in error and against the plaintiff in error.

VI.

Said supreme court of Illinois erred in rendering judgment in said cause in favor of the defendant in error and against the plaintiff in error.

VII.

Said supreme court of Illinois erred in deciding that no contract to pay the rates for water which were charged by the plaintiff in error to the defendant in error existed between said defendant in error and the plaintiff in error by virtue of the application for water and the acceptance thereof in said record appearing, and which decision of said court impairs the obligation of said contract, in violation of the provisions of the Constitution of the United States.

Wherefore the said plaintiff in error, The Rogers Park Water Company, prays that the judgment of said supreme court of Illinois may be reversed by this honorable court.

NEWTON A. PARTRIDGE,
Attorney for said Plaintiff in Error.

c UNITED STATES OF AMERICA, *ss:*

To John B. Fergus, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, thirty (30) days after the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein The Rogers Park Water Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph N. Carter, chief justice of the supreme court of the State of Illinois, this 14th day of April, A. D. 1899.

JOSEPH N. CARTER,
Chief Justice of the Supreme Court of the State of Illinois.

Received copy of above this April 15th, 1899.

JESSE B. BARTON,
Attorney for John B. Fergus.

JOHN B. FERGUS,
By JESSE B. BARTON,
His Attorney.

d In the Supreme Court of Illinois.

ROGERS PARK WATER COMPANY, a Corporation,
vs.
JOHN B. FERGUS.

I, Christopher Mamer, clerk of the supreme court, do hereby certify that on the fifteenth day of April, in the year of our Lord one

thousand eight hundred and ninety-nine, a copy of the foregoing citation and acceptance of service was lodged in my office at Springfield, Illinois.

Witness my hand and the seal of said court this twentieth day of April, A. D. 1899.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of Supreme Court.

e UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Illinois between The Rogers Park Water Company, a corporation, as appellant, and John B. Fergus, as appellee, a manifest error hath occurred, to the great damage of the said Rogers Park Water Company, as by its complaint appears, and wherein it is claimed its certain rights and privileges under the Constitution of the United States were decided against by your said court, and that your said court decided in favor of a certain authority exercised under the State of Illinois, which said authority and the exercise thereof was repugnant to the Constitution of the United States, we, being willing the said errors, if any hath been, shall be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

f Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of April, in the year of our Lord 1899.

[The Seal of the Circuit Court of the United States for the South'n Dist. Ill.]

JAMES T. JONES,
Clerk Circuit Court U. S., South. Dist. Ills.

Allowed by—

JOSEPH N. CARTER,
Chief Justice Supreme Court of Illinois.

g In the Supreme Court of Illinois.

ROGERS PARK WATER COMPANY, a Corporation,
vs.
JOHN B. FERGUS.

I, Christopher Mamer, clerk of the supreme court, do hereby certify that on the fourteenth day of April, in the year of our Lord one thousand eight hundred and ninety-nine, a copy of the foregoing writ of error for defendant in error was lodged in my office, at Springfield, Illinois.

Witness my hand and the seal of the said court this twentieth day of April, A. D. 1899.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk Supreme Court.

h In the Supreme Court of Illinois.

ROGERS PARK WATER COMPANY, a Corporation,
vs.
JOHN B. FERGUS.

I, Christopher Mamer, clerk of the supreme court of Illinois, elected for the northern grand division of said State, and keeper of the records and files thereof, by virtue of the foregoing writ of error and in obedience thereto do hereby certify that the following pages, numbered from one (1) to one hundred and eighty-eight (188), inclusive, contain a true and complete transcript and copy of the record and proceedings had in said court in the case which is above entitled and of the whole thereof, including the opinion of the court, as the same remain of record and on file in my said office.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

In testimony whereof I have hereunto set my hand and caused the seal of said supreme court of Illinois to be hereunto affixed, at Springfield, this twentieth day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

1 At a supreme court begun and held at Springfield, on Tuesday, the seventh day of June, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the day and year last aforesaid, to wit, the seventh day of June, A. D. 1898, there was filed in the office of the clerk of said court a certain transcript of the record and proceedings of the circuit court of Cook county; which said transcript is in the words and figures following, viz:

2 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Please before the Honorable Elbridge Hanecy, one of the judges of the circuit court of Cook county, at a term thereof begun and held in the court-house, at Chicago, in said county and State, on the third Monday (being the 21st day) of March, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

Present: Honorable Elbridge Hanecy, one of the judges of the circuit court of Cook county, State of Illinois; Charles S. Deneen, State's attorney; James Pease, sheriff.

Attest: JOHN A. COOKE, *Clerk.*

3 Be it remembered that heretofore, to wit, on the 13th day of December, A. D. 1897, a certain People's writ of summons issued out of the office of the clerk of said court and under the seal thereof, directed to the sheriff of Cook county to execute; which said writ, together with the return of the sheriff thereon endorsed, *are* in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Rogers Park Water Company, if it shall be found in your county, personally to be and appear before the circuit court of Cook county on the 20th day of December, A. D. 1897, to be holden at the court-house, in the city of Chicago, in said Cook county, on the 20th day of December, 1897, to answer unto John B. Fergus in a certain petition for mandamus; and have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness John A. Cooke, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 13th day of December, A. D. 1897.

[SEAL.] JOHN A. COOKE, *Clerk.*

4 The within-named defendant not found in any county this 20th day of December, 1897.

JAMES PEASE, *Sheriff,*
By E. E. LEE, *Deputy.*

And afterwards, to wit, on the 21st day of December, A. D. 1897, a certain alias writ of summons issued out of the office of the clerk of said court and under the seal thereof, directed to the sheriff of Cook county to execute; which said writ, together with the return of the sheriff thereon endorsed, *are* in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

The People of the State of Illinois to the sheriff of said county, Greeting:

We again command you that you summon Rogers Park Water Company, if it shall be found in your county, personally to be and to appear before the circuit court of Cook county to be holden at the court-house, in the city of Chicago, in said Cook county, on the twenty-seventh day of December, A. D. 1897, to answer unto John B. Fergus in his certain petition for mandamus filed in said court: and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness John A. Cooke, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 21st day of December, A. D. 1897.

[SEAL.] JOHN A. COOKE, *Clerk.*

5 Served this writ on the within-named Rogers Park Water Company, a corporation, by delivering a copy thereof to H. E. Keeler, president of said corporation, this 22nd day of December, 1897.

JAMES PEASE, *Sheriff,*
By E. E. LEE, *Deputy.*

Be it remembered that heretofore, to wit, on the 13th day of December, 1897, a certain petition for mandamus was filed in the office of the clerk of said court in words and figures following, to wit:

Petition.

STATE OF ILLINOIS, } ss.
County of Cook, }

In the Circuit Court of Cook County.

JOHN B. FERGUS
vs. } Petition for Mandamus.
ROGERS PARK WATER COMPANY.

To the honorable judges of the circuit court of Cook county:

Your petitioner, John B. Fergus, respectfully represents that he is the tenant and occupant of the premises described as lot seven (7), in Horace A. Goodrich's subdivision of block nine (9), in North Shore Boulevard subdivision, being a subdivision of the east half of the southwest quarter of section thirty-two (32), township forty-
6 one (41) north, range fourteen (14) east, of the third principal meridian, except the south thirty (30) acres thereof, situated

in the county of Cook and State of Illinois, and as such occupant and tenant is obliged to pay all water rates legally assessed against and levied upon said property.

That there is situated upon said premises and occupied by your petitioner a certain dwelling-house having a frontage of forty-eight (48) feet, facing on the Sheridan road or drive, a public street running through said subdivision; that said dwelling-house is two (2) stories in height, and is occupied by your petitioner's family only, which family consists of less than twelve (12) persons, including all children, boarders, employés, and servants; that said dwelling-house contains but one bathing tub, two water-closets, no urinal, three wash-hand basins with faucets, and is not heated with steam, connected with any piping hereinafter mentioned, nor has it any green-house attached thereto, but has one hose used for sprinkling or washing walks, windows, and like purposes; that no building other than said dwelling-house is situated on said premises; that said premises are situated in that part of the city of Chicago which was formally the village of Rogers Park.

That said village of Rogers Park, on the 12th day of November, 1888, and thenceforth and until the 4th day of April, 1893, was a municipal corporation organized and existing under chapter 24 of the Revised Statutes of the State of Illinois and the amendments thereto; that on or about said 4th day of April, 1893, the said village of Rogers Park became annexed to and ever since has been and still is a part of the city of Chicago, a municipal corporation
organized and existing under said chapter 24 of said Revised
7 Statutes and the amendments thereto.

And your petitioner further represents that the Rogers Park Water Company is a corporation incorporated on or about the 24th day of January, 1889, under chapter 32 of the Revised Statutes of the State of Illinois and the amendments thereto, having for the object of its incorporation "to locate, construct, and operate a system of water works, with all appliances for pumping and distributing water in the village of Rogers Park, in said county and State, and its vicinity, to own all real estate used in connection therewith, and to construct and operate all machinery and appliances to furnish electricity for light, heat, and power in said locality;" that in pursuance of its said object of incorporation the said Rogers Park Water Company did, soon after its said incorporation, locate, construct, and put in operation a system of water works with all appliances for pumping and distributing water in said village of Rogers Park, including water mains and supply pipes laid in and along the public streets of said village and that part of said city of Chicago which was formally the village of Rogers Park, and on or about the 9th of May, 1892, laid a water pipe in said Sheridan road or drive and in front of the said premises so as aforesaid occupied by your petitioner; that said water pipe so laid in Sheridan road or drive is connected with the appliances of said company for pumping water, and is used by said company for distributing water to the occupants of premises situated along and on said Sheridan road or drive, and is connected with the said dwelling-house

so as aforesaid occupied by your petitioners by the usual
8 water supply pipe, in which is set or constructed a cock for the purpose of letting the water into the said dwelling-house or shutting off therefrom; that by reason of its incorporation as aforesaid and the location, construction, and operation of said system of water works and appliances for pumping and distributing water and the laying of said water mains in the streets aforesaid the said company has become a common distributor of water to the inhabitants of the territory formerly known as the village of Rogers Park, and has held itself out as such; that on, to wit, October 4, 1897, the city council of the city of Chicago passed an ordinance, which was, on or about October 11, 1897, approved by the mayor of said city, in which it was ordained that the maximum rates and charges for the supply of water furnished by the Rogers Park Water Company to the inhabitants of that part of the city of Chicago in which said company has been or may be authorized to lay water mains and supply pipes are hereby established and fixed so as to be uniform and equal in every particular with those charged by the city of Chicago for water supplied from the city water works.

That on said October 4, 1897, there was and ever since has been in force in said city of Chicago an ordinance establishing the maximum water rates charged by the city of Chicago for water supplied from the city water works, whereby the maximum rates per annum for dwelling-houses two stories in height and having a frontage of forty-eight feet were fixed at $15.50; for water-closets in private dwelling-houses, beyond one, each $3.00 per annum, and wash-hand basins with faucets, beyond one, $1.00 per annum, and $3.00 per annum for each hose used for sprinkling, etc.

9 That said Chicago city water rates were made payable in two semi-annual installments in advance, due on the first day of November and of May, respectively, with a discount of fifteen (15%) per cent. if paid on or before the 15th day of December and June respectively, the semi-annual installment due November 1st being for one-half of the aggregate of said water rates, except those charged for hose, and the whole of said annual charge for a hose being payable with the installment due May 1st; that the maximum water rates or charges due on the dwelling-house so, as aforesaid, occupied by your petitioner, — uniform and equal in every particular with those charged by the city of Chicago for water supplied from the city water works for the half year from November 1st, 1897, to May 1st, 1898, and due November 1st, 1897, if paid on or before December 15th, 1897, amount to the sum of $8.72.

And your petitioner further represents that he did prior to the 1st day of November, 1897, cause the several water fixtures in the said dwelling-house to be connected with the main water supply pipe of said Rogers Park Water Company so, as aforesaid, laid in said Sheridan road or drive, and did on the 11th day of December, 1897, tender to said Rogers Park Water Company, in lawful money of the United States, the said sum of $8.72, and then and there requested and demanded of said company that it turn the water from its said water supply or main pipe in said Sheridan road or drive

into the pipes leading to said dwelling-house, and thereby supply water to your petitioner and his said family, but the said Rogers Park Water Company then and there refused, and still does refuse, to turn on said water and supply your petitioner with water unless your petitioner pays to it the sum of $13.50, being the sum demanded by it for supplying water to said dwelling-house for
10 the half year beginning November 1st, 1897, and your petitioner says that he stands ready and willing to pay, and hereby offers and tenders to said Rogers Park Water Company, the said sum of $8.72 for a supply of water to said dwelling-house for the half year aforesaid.

And your petitioner further represents that by reason of the premises the said Rogers Park Water Company has assumed the duty and it is its duty to furnish water to your petitioner for use in said dwelling-house for the half year commencing November 1st, 1897, upon the payment by your petitioner of the said sum of $8.72; and your petitioner has the clear legal right, upon the payment or lawful tender to said Rogers Park Water Company of said sum of $8.72, to demand of it that it turn the water from its said main or supply pipe in said Sheridan road or drive into the pipe in said dwelling-house and to supply water to said dwelling-house up to and until May 1st, 1898.

Wherefore your petitioner prays that a writ of mandamus issue out of this honorable court, directed to the said Rogers Park Water Company, commanding it to receive said sum of $8.72, which your petitioner stands ready and willing to pay, and hereby offers to pay into court for the use of said company, and thereupon to turn on and supply to your petitioner in said dwelling-house water until the 1st day of May, 1898, and that such further order may be made in the premises as justice may require, etc.

That the writ of summons issue, returnable in a short day, as required by the statutes in such case made and provided and as this honorable court shall direct, commanding the said Rogers Park Water Company to answer this petition and show cause why
11 a writ of mandamus should not issue, as aforesaid.

JOHN B. FERGUS.

JESSE B. BARTON,
Petitioner's Attorney.

STATE OF ILLINOIS, } ss:
County of Cook, }

John B. Fergus, being duly sworn, says that he is the petitioner in the above and foregoing petition; that he has read the same and knows the contents thereof, and that the same is true.

JOHN B. FERGUS.

Subscribed and sworn to before me this 13th day of December, 1897.

[SEAL.] HENRY H. BREGSTONE,
Notary Public.

Let a writ of summons issue returnable Dec. 20th, 1897.
JOHN GIBBONS, *Judge.*

And afterwards, to wit, on the 27th day of December, A. D. 1897, a certain appearance was filed in the office of the clerk of said court in words and figures following, to wit:

12 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } Petition for Mandamus.

We hereby enter the appearance of the Rogers Park Water Company, a corporation, etc., defendant in the above-entitled cause, and our appearance as its attorneys.

(Endorsed on back:) 178,846, 22899. Circuit court of Cook county. John B. Fergus *vs.* Rogers Park Water Company. Appearance. Filed December 27, '97. P'd $3.00. John A. Cooke, clerk. Partridge & Partridge, attorneys-at-law, Borden block, Chicago.

13 And afterwards, to wit, on the 3rd day of January, A. D. 1898, a certain demurrer was filed in the office of the clerk of said court in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } Petition for Mandamus.

Now comes the defendant, The Rogers Park Water Company, a corporation, etc., in the above-entitled cause, by Partridge & Partridge, its attorneys, and demurs to the petition for mandamus heretofore filed herein by said petitioner, John B. Fergus, and says that the matters and things in said petition contained in manner and form as therein set forth are not sufficient in law to entitle the said petitioner to the relief therein prayed for, nor to any part thereof, against this defendant.

And the defendant shows to the court the following causes of demurrer:

1. The said petition alleges that the petitioner is obligated to pay all water rates legally assessed against and levied upon the said real estate and property in said petition described; but no foundation or ground for such liability nor for any legal liability on the part of said petitioner to pay the said rates, or any part thereof, is

therein set forth and stated, nor does it appear by the said
14 petition that the said water rates nor any water rates which have been or may be assessed against the said real estate and property by the defendant would be or become a legal liability or lien against or upon said premises or against said petitioner.

2. The said petition does not allege that the defendant now has or has ever received any authority, license, grant, privilege, or franchise from the village of Rogers Park or the city of Chicago which authorizes the defendant to lays its pipes for the distribution of water in the public streets, grounds, or ways contained within the district or territory formerly comprised in said village of Rogers Park, but the defendants says that without such grant of authority and acceptance thereof by this defendant no public duty or liability would be imposed or rest on this defendant to supply water to the said premises nor to the petitioner nor to the inhabitants along the lines of its water mains.

3. The said petition does not allege or set forth that the defendant is or has been at any time authorized by said village of Rogers Park or by the city of Chicago to lay water mains and supply pipes in the said street called Sheridan road or drive, so that it does not appear by said petition that the supply of water by the defendant to the said premises and to the petitioner are within the provisions of the said supposed ordinance of the city of Chicago alleged to have been passed October 4th, 1897, and approved on or about October 11th, 1897.

4. The said supposed ordinance of October 4th, 1897, is not set forth with sufficient particularity and the provisions thereof do not sufficiently appear in and by said petition.

15 5. The said petition fails to allege sufficient facts to show that the petitioner is entitled to the relief, or any part thereof, therein prayed for against said defendant.

Wherefore, and for other good causes of demurrer appearing upon the face of said petition, this defendant demurs to the said petition, and says that the same is not sufficient in law to require this defendant to make answer or return thereunto, nor for the said petitioner to have or maintain his aforesaid action against this defendant.

And this it is ready to verify. Wherefore it prays judgment, etc.

PARTRIDGE & PARTRIDGE,
Defendant's Attorneys.

And afterwards, to wit, on the 13th day of January, A. D. 1898, a certain answer was filed in the office of the clerk of said court in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } Petition for Mandamus.

Answer.

Now comes the defendant, The Rogers Park Water Company, a corporation, etc., by Partridge & Partridge, its attorneys, and makes answer unto the said petition heretofore filed in the above-entitled cause, and, answering, says:

16 This defendant admits that said petitioner, John B. Fergus, at the time of filing said petition was and still is the occupant of said premises in said petition described, and that he resides in the dwelling-house in said petition referred to, but the defendant denies that said house is no more than two stories in height, and denies that said petition truly sets forth the various appliances and fixtures in said house and on said premises for the supply of water to the inhabitants thereof.

This defendant admits that said premises are situated in that part of the city of Chicago which was formerly the village of Rogers Park; that said village during the time in said petition named was a municipal corporation, as therein set forth; that said village on or about the 4th day of April, 1893, became annexed to, ever since has been, and still is a part of the city of Chicago, which is a municipal corporation, as set forth in said petition.

Further answering, this defendant alleges that on and before the said 12th day of November, A. D. 1888, the said village of Rogers Park was desirous of obtaining a supply of water for public use in the manner and form by statute provided, and that thereupon, for the purpose of obtaining a supply of water for public use, the board of trustees of the said village of Rogers Park on said 12th day of November, 1888, passed a certain ordinance, which ordinance was on the same day duly approved by the president of said village of Rogers Park, and which ordinance is entitled and is in substance as follows:

17 An ordinance to provide for a supply of water to the village of Rogers Park, Ill., and its inhabitants, contracting with H. E. Keeler, his successors and assigns, for a supply of water for public use, and giving the said village of Rogers Park, Ill., an option to purchase the said works.

Be it ordained by the board of trustees of the village of Rogers Park, Cook county, Illinois.

SECTION 1. That in consideration of the public benefit to be derived therefrom the village of Rogers Park Illinois, hereby grants the exclusive right and privilege for the period of thirty years from the time that this ordinance takes effect unto H. E. Keeler, his suc-

cessors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and the said village thereby grants the exclusive right of using the streets, alleys, public squares and all other public places within the corporate limits of said village as they now exist, or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for furnishing storing, and conducting an adequate supply of good wholesome clear water to the said village and to its inhabitants for public and private use, and for making repairs and extensions to the said system from time to time during the period in which this ordinance shall be in force.

The said grantee, his successors and assigns, shall exercise
18 care and diligence in the use of the said streets, alleys, public squares and other public places, and shall cause no unnecessary obstruction of, or interruption of the public travel over or upon same or any injury to, or interference with any pipes, mains, or sewers which *now* be lawfully located beneath thereof.

That said grantee, his successors and assigns, shall take due precaution to provide against danger to life and limb by reason of the exercise of their rights and privileges, and shall cause all excavations and obstructions to be properly lighted and guarded at night, and after the completion of the purpose for which said streets, alleys, public squares and other public places may be used, they shall be restored to their former conditions as near as may be without unnecessary delay.

The said grantee, his successors and assigns, hereby agree to hold the said village harmless from liability which may result to it by reason of any violation of this section.

SECTION 2. The general plan of the system of said water works shall be as follows: same to be subject to approval of the village board of trustees.

Mains.—These shall be ample in size to supply water to meet the demands for water for fire and domestic purposes and shall vary in diameter from 12 inches to 4 inches.

They shall be of the best quality of cast-iron pipe and will be tested at the foundry to a pressure of three hundred (300) pounds to the square inch, and shall be tested after the works are completed to a pressure of 125 pounds per square inch, as shown
19 by a *guage* attached to a hydrant near the Chicago & Northwestern Railroad depot, and remain tight under said pressure, provided that no single length of four-inch remain longer than eight hundred (800) feet shall be constructed and laid.

Hydrants.—These shall be of the best kind and quality manufactured, shall be provided with two hose nozzles and shall be frostproof. They shall be strong enough to stand the same test as those provided for the mains. The grantee, or assigns, shall furnish at their expense sixty hydrants with their branch castings and connections and located in such places upon the first five miles of mains as the trustees may direct. Said location to be made within

thirty days after the accepting of this ordinance, and if the village shall at any time in the future elect to place intermediate hydrants on the said first five miles of mains such hydrants shall be placed by the grantee or assigns at the expense of the village — shall pay the necessary expense of keeping them in order, but shall pay no rent therefor. Those furnished and located at the time the mains are laid shall be erected and connected with mains by the grantee or assigns. Those furnished and located thereafter shall be erected and connected with the mains by the grantee or assigns, but the cost thereof shall be paid by the village of Rogers Park. Said hydrants shall be under the sole charge, for said village, of the chief of the fire department, and all repairs and damages except those caused by ordinary wear and tear shall be repaired by said grantee or assigns and the actual cost of such repairs shall be paid by the village.

20 Gates and valves.—These shall be of the best quality and shall stand successfully the test prescribed for the mains.

Pumps.—The pumping machinery used shall be one compound and one high-pressure duplex pumping engine, and shall at the outset have a capacity sufficient for fulfilling the terms and conditions of this ordinance, same to be of not less than 1,500,000 gallons capacity in 24 hours, and shall have boilers of capacity to furnish sufficient steam for them when running at full speed. It and its appurtenances shall be of the best make, strong and durable. It will be kept in good working order at all times, saving unavoidable accidents, and its total capacity shall be increased from time to time as the needs of the village may require. It will be so arranged that the connection with stand-pipe may be closed instantly and that it will pump directly into the mains.

Stand-pipe.—This shall be built of steel and shall be not less than 12 feet in diameter. Its top shall not be less than 100 feet above the elevation of the ground in front the C. & N. W. R. R. depot in said village of Rogers Park. It shall at all times be kept as nearly full as is practical.

SECTION 3. In consideration of public benefits and the protection to property resulting from the construction of the said system of water works, the said village hereby agrees to pay an annual rental for fire protection to the said grantee, his successors or assigns, for not less than five miles of mains within the corporate limits of said village, for the aforesaid period of thirty years, at the annual rate of five hundred and seventy-five (575) dollars for each mile of

21 mains, to be payable semi annually on the first day of January and July in each year. In further consideration the village of Rogers Park agrees to pay all municipal or village taxes which may be assessed against the plant of the said grantee, assigns, for the first ten years the water works are operated. The rental for fire protection of mains in excess of the first five miles laid, as thereinafter provided, at the request of the said village shall be at the annual rate of four hundred dollars for each mile of mains, payable as aforesaid during the unexpired period of the said original term of thirty years. The rental shall begin at such time

as the said grantee or assigns shall begin to maintain continuously a pressure of 40 pounds a square inch.

Water shall be used from the hydrants for the extinguishment of fires, and for flushing sewers only. In flushing sewers automatic devices may be used and so regulated that they shall not discharge more than 60 gallons each per day, and, that there shall not be more than ten for each mile of mains, and the same shall be always kept in working condition by the village and all waste of water prevented. The village shall have also the right to use water from all the public hydrants during the full term and continuance of this franchise and contract for the purpose of flushing public sewers and gutters whenever the said village shall deem it necessary for sanitary purposes, upon giving notice to said grantee or assigns at the pumping station. Said flushing to be done by the village through hose and fire nozzle only, but there shall not be more than two hydrants open at one time for such purpose,
22 and no one hydrant shall be opened oftener than twice a week and not longer than twenty minutes at one time for such purpose, and there shall be no flushing in the time of fire. The village shall use the water provided in all of above cases in a reasonable manner and without unnecessary waste. Said grantee, his successors and assigns, hereby agree to furnish without additional charge, in consideration of franchise and rentals, hereby agreed to be paid by said village, water sufficient to supply two public drinking fountains for the use of man and beast.

The supply of each shall not be larger than one-half inch in diameter, to be constructed at such places in said village as said village board may direct. Also one jet fountain of not to exceed $\frac{1}{8}$-inch orifice in each of the public parks of said village: also water sufficient to supply each of the public schools in said village, and also at the public offices of said village, and for the use of the fire department at the engine-houses of said village. The said village agrees to furnish said fountains, faucets, etc., and furnish all material and pay the expenses of connecting same with the mains of grantee or assigns and to use every precaution to prevent all waste of water.

SECTION 4. Said grantee, his successors and assigns, in consideration of the rentals herein agreed to be paid and in consideration of the rights and privileges granted, expressly agrees on its part to furnish to said village of Rogers Park, and to the residents thereof,
23 an adequate supply of good, wholesome and clear water fit for culinary and drinking purposes; said water to be taken from Lake Michigan at such a point near the north boundary line of said village as will best insure its freedom from sewer contamination, and it shall be filtered by the most modern and by an acceptable process before being delivered into the mains for supplying said village, and if said grantee, his successors and assigns, shall at any time fail to furnish a supply of water to the said village and the residents thereof, of the quality and quantity provided for in the ordinance, then all rentals to be paid by said village to said grantee or assigns, shall cease until said grantee or assigns shall

provide and supply water of the degree of purity and in the quantity provided for in this ordinance; and also provided that should said grantee or assigns fail to supply water of the quality and quantity and in the manner aforesaid to said village and its inhabitants for a greater length of time than one year at any one time, and after having been given due notification by said village, that the authorities of said village consider the supply of water, either in quality or quantity, nor in compliance with this ordinance, then the said grantees or assigns shall forfeit and surrender to said village its said franchise and all other rights and privileges granted under this ordinance and the contract herein entered into shall be null and void. Said grantee or assigns further agrees to furnish such steam as may be needed for running one or more air-compressors to be furnished by said village and located in the pumping station of said grantee or assigns—the total power used by said air-compressors shall at the outset not exceed ten-horse power. All power in excess
24 of that above provided, which said village may need for running air-compressors, shall be furnished by said grantee or assigns at a cost of seventy-five dollars per horse-power per annum.

SECTION 5. Upon the completion of *of* the construction of the said system of water the said grantee or assigns shall notify the board of trustees of said village to that effect and thereupon submit the works to such a test as will show the capacity of the works to be sufficient to throw water through 100 feet of 2½ inch hose and one-inch nozzle from each of six different hydrants not located on the same main, to a height of 90 feet above the level of the ground at the C. & N. W. R. R. depot when the air is still.

The performance at this test shall be a fulfillment by the grantee or assigns of the terms and conditions of this ordinance so far as relates to strength and capacity. Said grantee and assigns shall so maintain and enlarge said water works that they will at all times be capable of performing such tests, and said village board shall have the right to order a repetition of such tests annually by giving said grantee or assigns a written notice of thirty days, and a failure on the part of said grantee or assigns to make such test shall cause a suspension of said rental until said grantee or assigns successfully perform such test.

SECTION 6. Within sixty days after the day that this ordinance takes effect, the said grantee or assigns shall file a written acceptance thereof in the office of the village clerk, and at least $5,000.00 work and material on said works shall be done and furnished
25 before December 31, 1888. The construction of said water works shall be commenced within 60 days after this ordinance takes effect, and said water works shall be completed within one year after the commencement of the construction thereof, provided however, that the time during which said grantee or assigns are delayed by strikes, floods, act of God or the public enemy, legal proceedings for the maintenance or defense of their rights or in the acquisition of property, water rights, right of way, mutinous interference or by reason of any other cause whatever beyond its control,

shall form no part of the time limited in this ordinance for the performance of any act required by the terms thereof to be done by them.

SECTION 7. The said village board of trustees shall, from time to time, pass and enact ordinances under suitable penalties, providing for the protection of said works from damage, fraud or imposition.

SECTION 8. At the expiration of ten years after the completion of the said works and at the expiration of each succeeding period of five years thereafter the said village shall have the right and privilege to purchase said system of water works, provided that they notify the said grantee or assigns of their intention so to do at least six months before the expiration of said period or periods of years. The value of said system shall be ascertained as follows: The said grantee or assigns and the said village shall each appoint one person, and the two appointees shall choose a third, and the three persons then chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of the said system of water works. In case the two experts chosen disagree upon the
26 selection of the third he shall be appointed by the judge of the circuit court of some adjoining circuit. None of the board shall be residents of the village of Rogers Park, Ill. The said board in fixing the value of said works shall take into consideration the value of the franchise, the value of water rights and right of way, the revenue from the works, and all other facts and considerations legitimately connected with the said works. The said village shall within sixty days after the said board has rendered its decision pay the amount awarded in cash, and upon such payments said grantee or assigns shall transfer to the said village all their said rights and priveleges and property included *to* the said appraisement.

SECTION 9. The said grantee or assigns shall make extensions of mains whenever called upon to do so by the village board of said village, provided however that said extensions, shall be not less than 500 feet in length, and further provided that there shall be one water consumer for each 100 feet along the line of such extensions who shall agree to take water at the established rates for a period of at least two years but as a condition of making such extensions the village agrees to pay for public fire service upon such extensions at the rate of four hundred dollars per annum for each mile of such extension for the unexpired term of this franchise and contract.

SECTION 10. After the said works are put in operation, if at any time, the said grantee or assigns are unable to provide a fire pressure of 60 pounds on the distributing mains at the said C. & N. W. R. R. depot for a period of two weeks in succession, then the rental for the use and employment of the mains for the purpose aforesaid
27 shall cease until such standard of pressure shall be attained. Nothing herein contained shall be so construed as to prevent the said grantee or assigns from temporarily shutting off the water from its said system, or any portion thereof, for the purpose of making repairs or extensions to the same, and no liability shall attach to the said grantee or assigns for the suspension of the supply of

water, provided the repairs or extensions are made and the water turned on again without unnecessary delay.

SECTION 11. The said grantee or assigns shall have the right to make, alter, amend and enforce rules for governing the connections with their mains, and the use of the water and for preventing the waste of water.

SECTION 12. The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer and to charge and collect from them at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be five dollars.

Tariff of Water Rates.

Barber shop, first chair	$5.00
Barber shop, each additional chair	3.00
Bath-house, public, each	$7 to 15.00
Bath, private, each tub	3.00
Bath, boarding-house, each tub	5.00
Blacksmith shops, one fire	4.00
Blacksmith shop, each additional fire	3.00
28 Boarding and lodging houses and furnished rooms per room	1.00
Boarding schools, per room	1.00
Butcher shops, engines and boilers extra	$7 to 15.00
Dental office	6 to 10.00
Drug stores	10 to 25.00
Dwelling-houses, 5 rooms or less for family	6.00
Dwelling-houses, each additional room	1.00
Eating-houses	$10 to 25.00
Fountains flowing not exceeding three hours per day during the season from 1st of April to 1st of November, one-sixteenth orifice	8.00
Fountains one eight-jet for the season as above	10.00
Hose for sprinkling streets, including washing and sprinkling sidewalks, the outsides of buildings per lineal front foot, business houses per season of 6 months	15.00
Same as foregoing private houses per front foot	10.00
Hose for sprinkling lawns, 66 feet frontage	5.00
Hose for sprinkling lawns, each front foot in excess of 66 feet	05
Hotels, per room	1.00
Livery, sale and feed stables, per single stall including carriage-washing	3.50
Private stable, 1 horse, including carriage-washing	3.00
Private stables, each additional animal	1.50
Stores not specified otherwise, 22 feet front first floor	7.00
Stores, each additional floor	3.50
29 Stores, each additional front foot	.50
Urinals and hotels, boarding-houses	6.00

Urinals in blocks, mfg. establishments	4.00
Urinals in stores, banks and offices	3.00
Urinals in private houses	3.00

Urinals with constant flow special rates.

Wash-basins, stationary, first basin in private family free, all others each	3.00
Water-closets per bowl	3.00
" " " " public	5.00

Yard hydrants at dwelling or boarding-house rates.

All persons not satisfied at the schedule rates can have the privilege of putting in a water meter at their own expense.

Meter Rates.

Less than 300 gals. per day, per 100 gals	.050
300–400 gals. per day per 100 gals	.045
400–1,000 " " " " " "	.040
1,000–3,000 " " " " " "	.035
3,000–5,000 " " " " " "	.030
5,000 gals. and upwards per 100 gals	.025
10,00- gals. and upwards, per 100 gals	.020

Rates for all other purposes that may be applied for not named in the foregoing schedule of maximum rates will be fixed by estimation or meter, at the option of the grantee or assigns.

SECTION 13. A sufficient tax shall be levied and collected annually upon all taxable property in the village subject by law to such taxation to meet the payments under this ordinance as they may respectively mature, during the existence of any contract for public fire service, which tax shall be irrepealable from and after the passage of this ordinance, and in case the village shall be authorized to levy a special tax for such purposes, such tax shall be annually levied and the proceeds thereof shall be kept as a separate fund to be known as a fire-hydrant fund, and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed except that any excess of said tax in any one year over the amount necessary to pay rentals for such year may be used for any purpose that the village of Rogers Park may direct.

SECTION 14. Within 60 days after the passage of this ordinance said H. E. Keeler, his successors or assigns, shall file with the village an acceptance of the same, which acceptance duly acknowledged, before some officer duly authorized to administer oaths shall have the effect of a contract between the village and said H. E. Keeler, his successors or assigns.

Approved Nov. 12, A. D. 1888.

HENRY P. DALY,
President Board of Trustees.

Passed Nov. 12, A. D. 1888.

JOHN L. HEALY,
Village Clerk.

31 Further answering, this defendant says that on or about the 8th day of January, 1889, said H. E. Keeler, the grantee under said ordinance, presented to the said board of trustees and filed with the clerk of said village his acceptance of the said ordinance, and which acceptance was in substance as follows:

CHICAGO, *Jan.* 8, 1889.

To the board of trustees, village of Rogers Park, Ill.

DEAR SIRS: I hereby accept, as per section 14, the ordinance passed and approved Nov. 12th, 1888—An ordinance to provide for a supply of water to the village of Rogers Park, Ill., and its inhabitants, contracting with H. E. Keeler, his successors and assigns, for a supply of water for public use, and giving the said village of Rogers Park, Ill., an option to purchase the said works.

Yours respectively, H. E. KEELER. [SEAL.]

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Louis Danziger, a notary public in and for said county, in the State aforesaid, do hereby certify that H. E. Keeler, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

32 Given under my hand and notarial seal this ninth day of January, 1889.

LOUIS DANZIGER,
Notary Public. [SEAL.]

This defendant further admits that it is a corporation duly incorporated on or about the 24th day of January, 1889, under the statutes of the State of Illinois, having for the object of its incorporation, among other things, to locate, construct, and operate a system of water works, with all appliances for pumping and distributing water, in the village of Rogers Park, in said Cook county and State of Illinois, and its vicinity, and to own real estate used in connection therewith.

Further answering, this defendant alleges that on or about the 31st day of January, 1889, the said H. E. Keeler, the grantee named in said ordinance passed on the 12th day of November, 1888, by the board of trustees of said village of Rogers Park, duly assigned his rights and privileges under the said ordinance to this defendant, and that thereupon it became possessed of all the rights, benefits, and privileges, franchises, and immunities granted by or contained in the said ordinance or belonging to or in anywise growing out of the same, as assigned by said grantee, and that this defendant has ever since been and now is so possessed.

This defendant further admits that in pursuance of the said object of its incorporation this defendant did, soon after its incorporation, erect, construct, and put in operation a system of water

works, with all appliances for pumping and distributing
33 water, in said village of Rogers Park, including water mains and supply pipes in the public streets of said village, and in that part of the city of Chicago which was formally the village of Rogers Park, and this defendant alleges that each and all of said acts and things were done by the authority and virtue of the said ordinance thereinbefore set forth and not otherwise, and this defendant alleges and insists that thereupon and by virtue of the passage of the said ordinance and the acceptance by the said grantee therein named and the said assignment and acceptance thereof by this defendant that the said ordinance, together with the rights, priveleges, benefits, and immunities therein and thereby granted, became and constituted a contract between this defendant and the said village of Rogers Park and the city of Chicago.

This defendant admits that on or about the 9th day of May, 1897, it laid a certain water pipe or main in said street called the Sheridan road or drive and in front of the said premises occupied by said petitioner and in said petition described, and that said water main is part of the system of pipes for the distribution of water operated by this defendant and is connected with its pumping station; that said water main is connected by a supply pipe with the appliances and fixtures contained in said dwelling-house for the purpose of supplying water to the occupants thereof, and that there is set in said supply pipe a cock for the purpose of letting on and shutting off the water between the said main and the said dwelling-house.

This defendant admits that on or before October 4th, 1897, and ever since that time there has been in force in the city of Chicago aforesaid an ordinance establishing the maximum water
34 rates charged by the city of Chicago for water supplied from the Chicago city water works, whereby the maximum water rates per annum for dwelling-houses are fixed substantially as in said petition set forth, but this defendant denies that the maximum water rates or charges due on said dwelling-house so occupied by said petitioner, if uniform and equal in every particular with those charged by the city of Chicago for a water supply from the Chicago city water works for the year from November 1st, 1897, to May 1st, 1898, if paid on or before December 15th, would amount to the sum of eight dollars and $\frac{72}{100}$ths, $8.72; but, on the contrary thereof, this defendant alleges that the amount of said rates would exceed the said sum by a large amount.

Further answering, this defendant denies that on October 4th, 1897, or on any other day the city council of the city of Chicago passed any legal and valid ordinance, in which it was ordained that the maximum rates and charges for the supply of water furnished by this defendant to the inhabitants of that part of the city of Chicago in which this defendant had been or might be authorized to lay water mains and supply pipes were established or fixed so as to be uniform and equal with those charged by the city of Chicago for water supply from the Chicago city water works; and this defendant alleges and insists that if any such supposed ordinance was

pretended to be so passed, as alleged in said petition, that such ordinance was void, illegal, and of no effect, because the said ordinances and contract hereinbefore set forth was then a valid and subsisting contract between the city of Chicago and this de-
35 fendant, and the said city of Chicago and the council thereof were without any right, power, or authority to change the terms of the said ordinance and contract, which fixed a rate to be charged by this defendant to the inhabitants of that part of the city of Chicago formerly comprised in said village of Rogers Park and including the premises in said petition set forth; and this defendant alleges and insists that by reason of the premises the said supposed ordinance was and is utterly void, without any force, effect, or legal authority whatever.

This defendant admits that the petitioner did, on or about the 11th day of December, A. D. 1897, tender to this defendant the said sum of eight dollars and $\frac{72}{100}$ths ($8.72), and requested and demanded that this defendant turn the water from its said water main in said Sheridan road or drive into the supply pipe leading to said dwelling-house so as to supply water to the petitioner; and this defendant admits that it demanded of said petitioner that he pay to it the amount of money so fixed and established by the said ordinance and contract then existing and in full force and validity, as above set forth, between this defendant and the said city of Chicago, of all of which the petitioner then and there had notice, but that to pay the said sum the petitioner then and there refused. Wherefore, for want of a sufficient tender and payment in that behalf, this defendant refused to turn on the said water and to supply the petitioner therewith; and this defendant says that the petitioner is deprived of the said water by means of his own wrongful neglect and refused to pay to this defendant the amount of its just, reasonable, and lawful charges in that behalf, and not otherwise, and this
36 the defendant is ready to verify. Wherefore it prays that the said petition may be dismissed, and that it may go thereof without day, and may recover its costs and charges in this behalf by it most wrongfully expended.

ROGERS PARK WATER COMPANY,
By PARTRIDGE & PARTRIDGE,
Its Attorneys.

And for a further answer in this behalf the defendant says that the said petitioner ought not to have or maintain his aforesaid petition against this defendant, because it says that before the said time when, etc., and after the said water main or pipe had been laid or constructed in front of the said premises on Sheridan road or drive, in said city of Chicago, and, to wit, on or about the 17th day of May, 1897, in said county, the said petitioner represented and stated himself to be the owner of said premises and applied to the defendant and requested it to permit an opening or tap to be made and placed in said water main and a connecting pipe to be laid between the said water main and the fixtures for the use of water contained in said premises and dwelling-house; and thereupon the said peti-

tioner made a written application to this defendant for the purposes aforesaid, which application was thereupon accepted by the defendant and which application and acceptance thereof constituted a contract between the said petitioner and this defendant, anwhich application then and there was made, executed, and delivered by the petitioner to the defendant, and which application was in writing and was in substance as follows:

37 APPLICATION No. 681.

Application for a Supply of Water.

ROGERS PARK, ILL., *May* 17, 1897.

To superintendent Rogers Park Water Company:

I, the undersigned, hereby request and contract for a supply of water from the company's mains to premises known as lot 7, block 9, No. 3229 Sheridan road, located on the west side of Sheridan road, between Devon and Albion Ave., in said village, and for use and from fixtures as en[illegible]rated on the margin hereof; said water to be supplied subject to the rules and regulations of said company now in force or which may hereafter be enacted or adopted, which rules and regulations are hereby made and declared to be a part of the contract between me and said company for supplying said premises with water.

J. B. FERGUS, *Owner.*

1 tap, 1 street washer or sill cock, 3 basins, 1 bath-tub, 2 water-closets, 11 rooms, 100 feet lawn.

And this defendant says before and at the time of the said application the water rates prescribed by said rules and regulations to be paid by the inhabitants of that part of the city of Chicago formerly comprised within said village of Rogers Park and including the said premises were and ever since have been as follows:

Barber shop, first chair	$5.00
Barber shop, each additional chair	3.00
Bath-house, public, each	7.00 to 15.00
Bath, private, each tub	3.00
Bath, boarding-house, each tub	5.00
Blacksmith shop, one fire	4.00
Blacksmith shop, each additional fire	3.00
Boarding and lodging houses and furnished rooms, per room	1.00
Boarding schools, per room	1.00
38 Butcher shops, engines and boilers extra	7.00 to 15.00
Dental office	6.00 to 10.00
Drug stores	10.00 to 25.00
Dwelling-houses, 5 rooms or less for family	6.00
Dwelling-houses, each additional room	1.00
Eating-houses	10.00 to 25.00

Fountains flowing not exceeding 3 hours per day during the season from 1st of April to 1st November, one-sixteenth orifice	8.00
Fountains, one eight-jet for the season as above	10.00
Hose for sprinkling streets, including washing and sprinkling sidewalks, the outside of buildings, per lineal front foot; business houses, per season of 6 months	15.00
Same as foregoing, private houses, per front foot	10.00
Hose for sprinkling lawns, 66 feet frontage	5.00
Hose for sprinkling lawns, each front foot in excess of 66 feet	.05
Hotels, per room	1.00
Livery, sale, and feed stables, per single stall, including carriage-washing	3.50
Private stable, 1 horse, including carriage-washing	3.00
Private stables, each additional animal	1.50
Stores not specified otherwise, 22 feet front, first floor	7.00
Stores, each additional floor	3.50
Stores, each additional front foot	.50
Urinals *and* hotels, boarding-houses	6.00
Urinals in blocks, mfg. establishments	4.00
Urinals in stores, banks, and offices	3.00
39 Urinals in private houses	3.00

Urinals with constant flow, special rates.

Wash-basins, stationary, first basin in private family free; all other, each	3.00
Water-closets, per bowl	3.00
Water-closets, public, per bowl	5.00

Yard hydrants at dwelling or boarding-house rates.

All persons not satisfied at the schedule rates can have the privelege of putting in a water meter at their own expense.

Meter Rates.

Less than 300 gals. per day, per 100 gals	.050
300–400 gals. per day, per 100 gals	.045
400–1,000 " " " " " "	.040
1,000–3,000 " " " " " "	.035
3,000–5,000 " " " " " "	.030
5,000 gals. and upwards, per 100 gals	.025
10,00– " " " " " "	.020

Rates for all other purposes that may be applied for, not named in the foregoing schedule of maximum rates, will be fixed by estimation or meter, at the option of the grantee or assigns.

Of all of which the petitioner then and there had notices, and the defendant says that the said premises in said petitione referred to are the same premises hereinbefore described, and that thereupon this defendant accepted the said application and caused and permitted the said main to be tapped and the said connection to be

made therewith for a supply of water to said premises, and
40 that the said petitioner thereupon paid to this defendant the regular rates prescribed by the said rules and regulations for the use of a supply of water to said dwelling-house and premises for the period beginning May 1, 1897, and ending Nov. 1, 1897, being the sum of — dollars.

This defendant avers and insists that by reason of the premises a contract between the said petitioner and the defendant was made and entered into with respect to a supply of water by the defendant to the petitioner for the said premises and dwelling-house during such time and for so long a time as the petitioner should desire the said water to be so supplied; that the petitioner is entitled to have a supply of water to himself and to the said premises and dwelling-house continued upon the terms and conditions of the said contract and not otherwise; and this defendant avers that it has been at all times ready and willing and still is ready and willing to supply water to said premises upon the terms prescribed in and by the said contract, of which the petitioner then and there had notice; but that to comply with the contract on his part, and to pay the sums of money in and by said contract and the said rules and regulations called for and required, the said petitioner neglects and refuses, and that it is solely by reason of such neglect and refusal on the part of the petitioner that the supply of water has been discontinued and cut off from the said premises by the defendant. Wherefore the defendant says that the petitioner is deprived of the said supply of water solely by reason of his own wrong; and this the defendant is ready to verify. Wherefore it prays judgment, etc.

ROGERS PARK WATER COMPANY,
By N. A. PARTRIDGE,
PARTRIDGE & PARTRIDGE,
Its Attorneys.

41 And afterwards, to wit, on the 14th day of January, A. D. 1898, a certain plea or traverse of petitioner was filed in the office of the clerk of said court in words and figures following, to wit:

STATE OF ILLINOIS, } ss.:
Cook County, }

Circuit Court of Cook County.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } Mandamus.

And now comes said petitioner, by Jesse B. Barton, his attorney, and, as to the answer of the said defendant filed herein, says:

That he is ready to aver, maintain, and prove the allegations of his said petition as to the height of the dwelling-house in his said petition described and as to the vario s appliances and fixtures therein.

And petitioner denies that the board of trustees of the said village of Rogers Park on the 12th day of November, 1888, or at any other time, passed an ordinance in the said answer described or any other ordinance of like tenor or effect, and says that the journal of the proceedings of said board of trustees of said village of Rogers Park at a meeting of said board of trustees held on the 12th day of November, 1888, shows that neither said ordinance nor any other ordinance of like tenor or effect was passed at said meeting by said board of trustees.

42 And petitioner admits that on or about January 8th, 1889, there was filed with the clerk of said village a certain instrument in writing substantially as set forth in said answer and purporting to be signed and sealed by one H. E. Keeler.

That petitioner has no knowledge of any assignment from said Keeler to said defendant January 31, 1889, or at any other time, but denies that by such assignment or by any assignment said defendant became possessed of any rights, benefits, or privileges, franchises, or immunities alleged to have been granted to said Keeler by said board of trustees, as in said answer set forth.

And this petitioner denies that any contract ever existed between said defendant and said village of Rogers Park or ever existed or now exists between said defendant and the city of Chicago by reason of the said alleged ordinance or concerning anything therein contained.

And petitioner denies that the maximum water rates or charges due on said dwelling-house so occupied by petitioner, if uniform and equal in every particular with those charged by the city of Chicago for a water supply from the *the* Chicago city water works for the half year from November 1st, 1897, to May 1st, 1898, if paid on or before December 15th, would amount to more than the sum of $8.72, and denies that the ordinance passed by the city council of the city of Chicago October 4th, 1897, as alleged in said petition, was illegal or invalid.

And petitioner denies that his refusal to pay defendant the sum demanded of him by it for a supply of water to said dwelling-house was wrongful.

43 And as to the further and separate answer of said defendant herein petitioner says that he admits that on or about May 17th, 1897, he signed the said application in the said further and separate answer of said defendant described, and delivered the same to said defendant, but denies that on said 17th day of May, 1897, or at any time thereafter, the rules or regulations of said defendants prescribed the water rates in said further and separate answer set forth, or any other water rates, and submits that even if such rules and regulations did prescribe water rates, the same are not now in force, but have been superseded by force and virtue of said ordinance passed by the said city council of the city of Chicago October 4th, 1897.

And this petitioner denies that by reason of the signing of said application or otherwise a contract was made and entered into with respect to a supply of water by the defendant to petitioner for the

said premises and dwelling-house during any period extending beyond November 1st, 1897; and petitioner submits that if any contract ever did exist between this petitioner and said defendant, the said defendant did, in and by its action in cutting off the supply of water to said premises prior to the filing of the petition herein and on or about the 10th day of December, 1897, elect to consider as terminated, rescinded, and canceled any and all contractual relations that might have heretofore existed in relation to said supply of water between petitioner and defendant.

Whereupon petitioner says that nothing in said answer or said further and separate answer contained ought to bar him
44 from the relief by him prayed in and by his original petition herein.

JOHN B. FERGUS, *Petitioner*,
By JESSE B. BARTON,
His Attorney.

JESSE B. BARTON,
Petitioner's Attorney.

And afterwards, to wit, on the 22nd day of January, A. D. 1898, a certain demurrer was filed in the office of the clerk of said court in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } Petition for Mandamus.

And the defendant, The Rogers Park Water Company, by Partridge & Partridge, its attorneys, as to the matters and things contained in the several pleas of the petitioner to the matters and things contained in the answer of this defendant to the said petition of John B. Fergus, heretofore filed herein, says:

That the matters and things in the first plea by said petitioner above pleaded are not sufficient in law, in manner and form as the same are therein set forth, to require this defendant to reply unto the same, because the said plea does not tender an issue, nor
45 does the same conclude to the country. Wherefore this defendant demurs to the said plea and prays judgment thereof, etc.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

And as to the matters and things by said petitioner secondly above pleaded this defendant says that the same are not sufficient in law, in manner and form as the same are therein set forth, to require this defendant to reply thereunto, because the said plea does not tender an issue of fact and does not conclude to the country in

manner and form as requested by law. Wherefore this defendant demurs to the said second plea and prays judgment thereof, etc.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

And as to the matters and things by the petitioner fourthly above pleaded this defendant says that the same are not sufficient in law, in manner and form as the same are therein set forth, to require this defendant to reply thereunto. Wherefore the defendant demurs to the said fourth plea and prays judgment thereof, etc.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

And as to the matters and things by the petitioner fifthly above pleaded this defendant says that the same are not sufficient in law, in manner and form as the same are therein set forth, to require this defendant to reply thereunto, because the said plea
46 tenders an issue of law and the same is not in the form required by law for a demurrer, nor does the same purport to admit the facts in the said answer contained for the purposing of raising an issue of law by demurrer. Wherefore the defendant demurs to the said plea and prays judgment thereof, etc.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

And as to the matters and things in the said plea by the petitioner sixthly above pleaded this defendant says that the same are not sufficient in law, in manner and form as the same are therein set forth, to require the defendant to reply thereunto, because the said plea is double in this, that the first part of the said plea, relating to the amount of maximum water rates or charges due on the said dwelling-house, tenders an issue of fact, and the latter part of said plea, alleging that the said ordinance of the city of Chicago of October 4th, 1897, is not illegal, tenders and issue of law; and, further, because the said plea is not in proper form to tender an issue of fact nor in the form of a demurrer to tender an issue of law, and that the said plea is in other respects informal and insufficient. Wherefore the defendants demurs to the same and prays judgment thereof, etc.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

And as to the matters and things contained in the said
47 plea by the petitioner seventhly above pleaded this defendant says that the said plea and the matters and things therein contained are not sufficient in law, in manner and form as the same are therein set forth, to require this defendant to reply thereunto. Wherefore the defendant demurs to the said plea and prays judgment thereof, etc.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

And as to the matters and things in the said plea contained by the petitioner first above pleaded to the second answer of this defendant the defendant says that the matters and things in said plea contained are not sufficient in law, in manner and form as the same are therein set forth, to require this defendant to reply thereunto, because the said plea is double in this, that the said plea in the first portion thereof denies that the rules and regulations of the defendant prescribed the water rates therein referred to, and thereby tenders an issue of fact, while the latter part of the said plea, in which the petitioner alleges that the said rules and regulations are not now in force, tenders and issue of law; and, further, because the said plea is not in manner and form sufficient to tender an issue of fact, nor does the same set forth and allege the said matters and things in the form required by a demurrer to tender an issue of law, and that the said plea is in other respects informal and insufficient. Wherefore the defendant demurs to the same and prays judgment thereof, etc.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

48 And as to the matters and things in the said plea contained by the petitioner secondly above pleaded to the second answer of this defendant the defendant says that the matters and things in said plea contained are not sufficient in law, in manner and form as the same are therein set forth, to require this defendant to reply thereunto, because the first part of said plea, which denies that a contract was made between the petitioner and the defendant with respect to the supply of water by the defendant to the petitioner, as therein set forth, tenders an issue of law with respect to the legal effect of the matters and things in said answer alleged respecting the said application and supply of water, but the same is not in form of a demurrer to tender an issue of law; that the latter portion of said plea, which alleges that if any contract had existed between the petitioner and this defendant that the legal effect of cutting off the said supply of water was to terminate the said contract, in like manner tenders an issue of law in regard to other, distinct, and seperate matters involved in the said answer; and, further, that the same is not in form of a demurrer to tender an issue of law. Wherefore the defendant says that the said plea is double, informal, and insufficient, and the defendant demurs thereto and prays judgment thereof, etc.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

49 And afterwards, to wit, on the 28th day of January, A. D. 1898, a certain amended answer was filed in the office of the clerk of said court in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } Petition for Mandamus.

Answer.

Now comes the defendant, The Rogers Park Water Company, a corporation, etc., by Partridge & Partridge, its attorneys, and makes answer unto the said petition heretofore filed in the above-entitled cause, and, answering, says:

1st Ans. This defendant admits that said petitioner, John B. Fergus, at the time of the filing of said petition was and still is the occupant of said premises in said petition described, and that he resides in the dwelling-house in said petition referred to, but this defendant denies that said house is no more than two stories in height, and denies that said petition truly sets forth the various appliances and fixtures in said house and on said premises for the supply of water to the inhabitants thereof.

This defendant admits that said premises are situated in that part of the city of Chicago which was formerly the village of Rogers Park; that the said village, during the time in said petition named, was a municipal corporation, as therein set forth; that said village on or about the 4th day of April, 1893, became annexed to, ever since has been, and still is a part of the city of Chicago, which is a municipal corporation, as set forth in said petition.

Further answering, this defendant alleges that on and before the said 12th day of November, A. D. 1888, the said village of Rogers Park was desirous of obtaining a supply of water for public use in the manner and form by statute provided, and that thereupon, for the purpose of obtaining a supply of water for public use, the board of trustees of the said village of Rogers Park on said 12th day of November, 1888, passed a certain ordinance; which ordinance was on the same day duly approved by the president of said village of Rogers Park, and which ordinance is entitled and is in substance as follows:

An ordinance to provide for a supply of water to the village of Rogers Park, Ill., and its inhabitants, contracting with H. E. Keeler, his successors and assigns, for a supply of water for public use, and giving the said village of Rogers Park, Ill., an option to purchase the said works.

Be it ordained by the board of trustees of the village of Rogers Park, Cook county, Ill.

SECTION 1. That in consideration of the public benefit to be derived therefrom, the village of Rogers Park Ill., hereby grants the

exclusive right and privilege for a period of thirty years from the time that this ordinance takes effect unto H. E. Keeler, his
51 successors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and the said village hereby grants the exclusive right of using the streets, alleys, public squares and all other public places within the corporate limits of said village as they now exist, or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for furnishing, storing and conducting an adequate supply of good wholesome, clear water to the said village and to its inhabitants for public and private use, and for making repairs and extensions to the said system from time to time during the period in which this ordinance shall be in force.

The said grantee, his successors and assigns, shall exercise care and diligence in the use of the said streets and alleys, public squares and other public places, and shall cause no unnecessary obstruction of, or interruption of the public travel over or upon same or any injury to, or interference with any pipes mains or sewers which may be now lawfully located beneath the surface thereof.

The said grantee, his successors and assigns, shall take due precaution to provide against danger to life and limb by reason of the exercise of their rights and privileges, and shall cause all excavations and obstructions to be properly lighted and guarded at night, and after the completion of the purpose, for which said streets,
52 alleys, public squares and other public places may be used, they shall be restored to their former condition as near as may be without unnecessary delay.

The said grantee, his successors and assigns, hereby agree to hold the said village harmless from liability which may result to it by reason of any violation of this section.

SECTION 2. The general plan of the system of said water works shall be as follo-s: same to be subject to approval of the village board of trustees.

Mains.—These shall be ample in size to supply water to meet the demands for water, for fire and domestic purposes and shall vary in diameter from 12 inches to 4 inches.

They shall be of the best quality of cast-iron pipes and will be tested at the foundry to a pressure of three hundred (300) pounds to the square inch, and shall be tested after the works are completed to a pressure of 125 pounds per square inch, as shown by a guage attached to a hydrant near the Chicago & Northwestern Railroad depot, and remain tight under said pressure, provided that no single length of four-inch main longer than eight hundred (800) — shall be constructed and laid.

Hydrants.—These shall be of the best kind and quality manufactured, shall be provided with two hose nozzles and shall be frost-proof. They shall be strong enough to stand the same test as those provided for the mains. The grantee, or assigns, shall furnish at

their expense sixty hydrants with their branch castings and
53 connections and located in such places upon the first five miles of mains as the trustees may direct. Said location to be made within thirty days after the acceptance of this ordinance, and if the village shall at any time in the future elect to place intermediate hydrants on the said first five miles of mains such hydrants shall be placed by the grantee or assigns at the expense of the village, and the village shall pay the necessary expense of keeping them in order, but shall pay no rent therefor. Those furnished and located at the time the mains are laid shall be erected and connected with the mains by the grantee or assigns. Those furnished and located thereafter shall be erected and connected with the mains by the grantee or assigns, but the cost thereof shall be paid by the village of Rogers Park. Said hydrants shall be under the sole charge, for said village, of the chief of the fire department, and all repairs and damages except those caused by ordinary wear and tear shall be repaired by said grantee or assigns, and the actual cost of such repairs shall be paid by said village.

Gates and valves.—These shall be of the best quality, and shall stand successfully the test prescribed for the mains.

Pumps.—The pumping machinery used shall be one compound and one high-pressure duplex pumping engine, and shall at the outset have a capacity sufficient for fulfilling the terms and conditions of this ordinance, same to be of not less than 1,500,000 gallons capacity in 24 hours, and shall have boilers of capacity to furnish sufficient steam for them when running at full speed.

54 It and its appurtenances shall be of the best make, strong and durable.

It will be kept in good working order at all times, saving untime to time as the needs of the village may require.

It will be so arranged that the connection with a stand-pipe may avoidable accidents, and its total capacity shall be increased from be closed instantly and that it will pump directly into the mains.

Stand-pipe.—This shall be built of steel and shall be not less than 12 feet in diameter. Its top shall be not less than 100 feet above the elevation of the ground in front of the C. & N. W. R. R. depot in said village of Rogers Park. It shall at all times be kept as nearly full as practical.

SECTION —. In consideration of the public benefits and the protection to property resulting from the construction of the said system of water works, the said village hereby agrees to pay an annual rental for fire protection to the said grantee, his successors or assigns, for not less than five miles of mains within the corporate limits of said village, for the aforesaid period of thirty years, at the annual rate of five hundred and seventy-five ($575) dollars for each mile of mains, to be payable semi-annually on the first day of January and July in each year. In further consideration, the village of Rogers Park agrees to pay all municipal or village taxes which may be assessed against the plant of the said grantee, — assigns for the first ten years the water works are operated. The rental

for fire protection of mains in excess of the first five miles
55 laid, as hereinafter provided, at the request of the said village shall be at the annual rate of four hundred dollars for each mile of mains, payable as aforesaid during the unexpired period of the said original term of thirty years. The rental shall begin at such time as the said grantee or assigns shall begin to maintain continuously a pressure of 40 pounds a square inch. Water shall be used from the hydrants for the extinguishment of fires, and for flushing sewers only. In flushing sewers automatic devices may be used and so regulated that they shall not discharge more than 60 gallons each per day, and that there shall be not more than ten for each mile of mains, and the same shall always be kept in working condition by the village and all waste of water prevented. The village shall have also the right to use water from all the public hydrants during the full term and continuance of this franchise and contract for the purpose of flushing public sewers and gutters whenever the said village shall deem it necessary for sanitary purposes, upon giving notice to said grantee or assigns at the pumping station. Said flushing to be done by the village through hose and fire nozzle only, but there shall not be more than two hydrants open at one time for such purpose, and no one hydrant shall be opened oftener than twice a week and not longer than twenty minutes at one time for such purpose and there shall be no flushing in the time of fire. The village shall use the water provided in all of above cases in a reasonable manner and without unnecessary waste. Said grantee, his successors and assigns, hereby agree to furnish, without additional charge, in consideration of franchise and rentals, hereby agreed to be paid by said village, water sufficient to supply
56 two public drinking fountains for the use of man and beast. The supply of each shall not be larger than one-half inch in diameter, to be constructed at such places in said village as said village board may direct. Also one jet fountain of not to exceed ⅛-inch orifice in each of the public parks of said village; also water sufficient to supply each of the public schools in said village, and also at the public offices of said village, and for the use of the fire department at the engine-house of said village. The said village agrees to furnish said fountains, faucets, etc., and furnish all material and pay the expenses of connecting same with the mains of grantee or assigns, and to use every precaution to prevent all waste of water.

SECTION 4. Said grantee, his successors and assigns, in consideration of the rentals herein agreed to be paid and in consideration of the rights and privileges granted, expressly agrees on its part to furnish to said village of Rogers Park, and to the residents thereof, an adequate supply of good, wholesome and clear water fit for culinary and drinking purposes; said water to be taken from Lake Michigan at such a point near the north boundary line of said village as will best insure its freedom from sewerage contamination, and it shall be filtered by the most modern and by an acceptable process before being delivered into the mains for supply-

ing said village, and if said grantee, his successors and assigns, shall fail at any time to furnish a supply of water to the said village and the residents thereof, of the quality and quantity provided for in
57 this ordinance, then all rentals to be paid by said village to said grantee or assigns shall cease until said grantee or assigns shall provide and supply water of the degree of purity and in the quantity provided for in this ordinance; and also provided that should said grantee or assigns fail to supply water of the quality and quantity and in the manner aforesaid to said village and its inhabitants for a greater length of time than one year at any one time, and after having been given due notification by said village that the authorities of said village consider the supply of water, either in quality or quantity, not in compliance with this ordinance, then the said grantee or assigns shall forfeit and surrender to said village its said franchise and all other rights and privileges granted under this ordinance, and the contract herein entered into shall be null and void. Said grantee or assigns further agrees to furnish such steam as may be needed for running one or more air-compressors to be furnished by said village and located in the pumping station of said grantee or assigns; the total power used by said air-compressors shall *be* at the outset not exceed ten-horse power. All power in excess of that above provided, which said village may need for running air-compressors, shall be furnished by said grantee or assigns at a cost of seventy-five dollars per horse-power per annum.

SECTION 5. Upon the completion of the construction of the said system of water works, the said grantee or assigns shall notify the board of trustees of said village to that effect and thereupon submit the works to such a test as will show the capacity of the works to be sufficient to throw water through 100 feet of 2½-inch hose and one-inch nozzle from each of six different hydrants not located
58 on the same main to a height of 90 feet above the level of the ground at the C. & N. W. R. R. depot when the air is still. The performance of this test shall be a fulfillment by the grantee or assigns of the terms and conditions of this ordinance so far as relates to strength and capacity. Said grantee and assigns shall so maintain and enlarge said water works that they will at all times be capable of performing such tests, and said village board shall have the right to order a repetition of such tests annually by giving said grantee or assigns a written notice of thirty days, and a failure on the part of said grantee or assigns to make such test shall cause a suspension of said rental until said grantee successfully performs such test.

SECTION 6. Within sixty days after the day this ordinance takes effect, the said grantee or assigns shall file a written acceptance thereof in the office of the village clerk and at least $5,000 work and material on said works shall be done and furnished before December 31, 1888. The construction of said water works shall be commenced within sixty days after this ordinance takes effect, and the said water works shall be completed within one year after the commencement of the construction thereof, provided, however, that the time during which said grantee or assigns are

delayed by strikes, floods, act of God, or the public enemy, legal proceedings for the maintenance or defense of their rights or in the acquisition of property, water rights, right of way, mutinous interference or by reason of any other cause whatever beyond its control, shall form no part of the time limited in this ordinance for
59 the performance of any act required by the terms hereof to be done by them.

SECTION 7. The said village board of trustees shall, from time to time pass and enact ordinances, under suitable penalties, providing for the protection of said works from damage fraud or imposition.

SECTION 8. At the expiration of ten years after the completion of the said works, and at the expiration of each succeeding period of five years thereafter, the said village shall have the right and privelege to purchase said system of water works, provided they notify the said grantee or assigns of their intention so to do at least six months before the expiration of said period or period- of years. The value of said system shall be ascertained as follows: The said grantee or assigns and the said village shall each appoint one person, and the two appointees shall choose a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of the said system of water works. In case the two experts chosen disagree upon the selection of the third he shall be appointed by the judge of the circuit court of some adjoining circuit. None of the board shall be residents of the village of Rogers Park, Ill. The said board in fixing the value of said works shall take into consideration the value of the franchise, the value of water rights, and right of way, the revenue from the works and all other facts and considerations legitimately connected with the said works. The said village shall within sixty days after the said board has rendered its decision pay the amount awarded in cash, and upon
60 such payments said grantee or assigns shall transfer to the said village all their said rights and priveleges and property included *to* the said appraisement.

SECTION 9. The said grantee or assigns shall make extension of mains whenever called upon to do so by the village board of said village, provided however that said extensions shall be not less than 500 feet in length, and further provided that there shall be one water-consumer for each 100 feet along the line of such extension who shall agree to take water at the established rates for a period of at least two years, but as a condition of making such extension the village agrees to pay for public fire service upon such extension at the rate of four hundred dollars per annum for each mile of such extension for the unexpired term of this franchise and contract.

SECTION 10. After the said works are put in operation, if at any time, the said grantee or assigns are unable to provide a fire pressure of 60 pounds on the distributing mains at the said C. & N. W. R. R. depot for a period of two weeks in succession then the rental for the use and employment of the mains for the purpose aforesaid shall cease until such standard of pressure shall be attained. Nothing herein contained shall be so construed as to prevent

the said grantee or assigns from temporarily shutting off the water from its system or any portion thereof, for the purpose of making repairs or extensions to the same, and no liability shall attach to the said grantee or assigns for the suspension of the supply of water, provided the repairs or extensions are made and the water turned on again without unnecessary delay.

61 SECTION 11. The said grantee or assigns shall have the right to make, alter, amend and enforce rules for governing the connections with their mains, and the use of the water and for preventing the waste of water.

SECTION 12. The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer and to charge and collect from him at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be five dollars.

Tariff of Water Rates.

Barber shop, first chair	$5.00
Barber shop, each additional chair	3.00
Bath-house, public, each	7.00 to 15.00
Bath, private, each tub	3.00
Bath, boarding-house, each tub	5.00
Blacksmith shop, one fire	4.00
Blacksmith shop, each additional fire	3.00
Boarding and lodging houses and furnished rooms per room	1.00
Boarding schools, per room	1.00
Butcher shops, engines and boilers extra	7.00 to 15.00
Dental office	6.00 to 10.00
Drug storse	10.00 to 25.00
Dwelling-houses, 5 rooms or less for family	6.00
Dwelling-houses, each additional room	1.00
Eating-houses	10.00 to 25.00
Fountains flowing not exceeding three hours per day during the season from April 1st to November 1st, one-sixteenth oriface	8.00
62 Fountains, one eight-jet for the season as above	10.00
Hose for sprinkling streets, including washing and sprinkling sidewalks, the outsides of buildings per lineal front foot, business houses per season of 6 months	15.00
Same as foregoing private house per front foot	10.00
Hose for sprinkling lawns, 66 feet frontage	5.00
Hose for sprinkling lawns, each front foot in excess of 66 feet	.05
Hotels per room	1.00
Livery, sale and feed stables, per single stall including carriage-washing	3.50
Private stable, 1 horse including carriage-washing	3.00
Private stables, each additional animal	1.50

Stores not otherwise specified, 22 feet front first floor	7.00
Stores, each additional floor	3.50
Stores, each additional front foot	.50
Urinals and hotels, boarding-houses	6.00
Urinals in blocks, mfg. establishments	4.00
Urinals in stores, banks and offices	3.00
Urinals in private houses	3.00

Urinals with constant flow, special rates.

Wash-basins, stationary, first basin in private family free, all others each	3.00
Water-closets, per bowl	3.00
Wate closets, public, per bowl	5.00

Yard hydrants at dwelling or boarding-house rates.

All persons not satisfied at the schedule rates can have the privelege of putting in a water meter at their own expense.

63 *Meter Rates.*

Less than 300 gals. per day, per 100 gals	.050
300-400 gals. per day per 100 gals	.045
400–1,000 " " " " " "	.040
1,000–3,000 " " " " " "	.035
3,000–5,000 " " " " " "	.030
5,000 gals. and upwards per 100 gals	.025
10,00– " " " " " "	.020

Rates for all other purposes that may be applied for not named in the foregoing schedule of maximum rates will be fixed by estimation or meter, at the option of the grantee or assigns.

SECTION 13. A sufficient tax shall be levied and collected annually upon all taxable property in the village subject by law to such taxation to meet the payments under this ordinance as they may respectively mature, during the existence of any contract for public fire service, which tax shall be irrepealable from and after the passage of this ordinance, and in case the village shall be authorized to levy a special tax for such purpose, such tax shall be annually levied and the proceeds thereof shall be kept as a separate fund to be known as a fire-hydrant fund, and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance and shall not be otherwise employed except that any excess of said tax in any one year over the amount necessary to pay rentals for such year may be used for any purpose that the village of Rogers Park may direct.

SECTION 14. Within 60 days after the passage of this ordinance said H. E. Keeler, his successors or assigns shall file with the village an acceptance of the same, which acceptance duly ac-
64 knowledged, before some officer duly authorized to administer oaths shall have the effect of a contract between the village and said H. E. Keeler, his successors or assigns.

Approved Nov. 12, A. D. 1888.

HENRY P. DALY,
President Board of Trustees.

Passed Nov. 12, A. D. 1888.

JOHN L. HEALY,
Village Clerk.

Further answering, this defendant says that on or about the 8th day of January, 1889, said H. E. Keeler, the grantee under said ordinance, presented to the said board of trustees and filed with the clerk of said village his acceptance of the said ordinance, and which acceptance was in substance as follows:

"CHICAGO, *Jan.* 8, 1889.

To the board of trustees, village of Rogers Park, Ill.

DEAR SIRS: I hereby accept, as per section 14, the ordinance passed and approved Nov. 12th, 1888—'An ordinance to provide for a supply of water to the village of Rogers Park, Ill., and its inhabitants, contracting with H. E. Keeler, his successors and assigns, for a supply of water for public use, and giving the said village of Rogers Park, Ill., an option to purchase said works.'

Yours respectfully, H. E. KEELER. [SEAL.]

65 STATE OF ILLINOIS, } ss.
County of Cook, }

I, Louis Danziger, a notary public in and for said county, in the State aforesaid, do hereby certify that H. E. Keeler, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this ninth day of January, 1889.

LOUIS DANZIGER,
[SEAL.] *Notary Public.*"

This defendant further admits that it is a corporation duly incorporated on or about the 24th day of January, 1889, under the statutes of the State of Illinois, having for the object of its incorporation, among other things, to locate, construct, and operate a system of water works, with all appliances for pumping and distributing water, in the village of Rogers Park, in said Cook county and State of Illinois, and its vicinity, and to own real estate used in connection therewith.

Further answering, this defendant alleges that on or about the 31st day of January, 1889, the said H. E Keeler, the grantee named in said ordinance passed on the 12th day of November, 1888, by the board of trustees of said village of Rogers Park, duly as-
66 signed his rights and priveleges under the said ordinance to this defendant, and that thereupon it became possessed of all of the rights, benefits, and priveleges, franchises, and immunities granted by or contained in the said ordinance or belonging to or in

anywise growing out of the same, as assigned by said grantee, and that this defendant has ever since been and now is so possessed.

This defendant admits that in pursuance of the said object of its incorporation this defendant did, soon after its incorporation, erect, construct, and put in operation a system of water works, with all appliances for pumping and distributing water, in said village of Rogers Park, including water mains and supply pipes in the public streets of said village, and in that part of the city of Chicago which was formerly the village of Rogers Park, and this defendant alleges that each and all of said acts and things were done by the authority and virtue of the said ordinance hereinabove set forth and not otherwise, and this defendant alleges and insists that thereupon and by virtue of the passage of the said ordinance and the acceptance by the said grantee therein named and the said assignment and acceptance thereof by this defendant that the said ordinance, together with the rights, privileges, benefits, and immunities therein and thereby granted, became and constituted a contract between this defendant and the said village of Rogers Park and the city of Chicago.

This defendant admits that on or about the 9th day of May, 1897, it laid a certain water pipe or main in said street called the Sheridan road or drive and in front of the said premises occupied by said petitioner and in said petition described, and that said
67 water main is part of the system of pipes for the distribution of water operated by this defendant and is connected with its pumping station; that said water main is connected by a supply pipe with the appliances and fixtures contained in said dwelling-house for the purpose of supplying water to the occupants thereof, and that there is set in said supply pipe a cock for the purpose of letting on and shutting off the water between the said main and the said dwelling-house.

This defendant admits that on or before October 4th, 1897, and ever since that time there has been in force in the city of Chicago aforesaid an ordinance establishing the maximum water rates charged by the city of Chicago for water supplied from the Chicago city water works, whereby the maximum water rates per annum for dwelling-houses are fixed substantially as in said petition set forth, but this defendant denies that the maximum water rates or charges due on said dwelling-house so occupied by said petitioner, if uniform and equal in every particular with those charged by the city of Chicago for a supply of water from the Chicago city water works for the year from November 1st, 1897, to May 1st, 1898, if paid on or before December 15th, would amount to the sum of eight dollars and $\frac{72}{100}$th- ($8.72); but, on the contrary thereof, this defendant alleges that the amount of said rates would exceed the said sum by a large amount.

Further answering, this defendant denies that on October 4th, 1897, or on any other day the city council of the city of Chicago passed any legal and valid ordinance, in which it was ordained that the maximum rates and charges for a supply of water fur-
68 nished by this defendant to the inhabitants of that part of the city of Chicago in which this defendant had been or

might be authorized to lay water mains and supply pipes were established or fixed so as to be uniform and equal with those charged by the city of Chicago for water supply from the Chicago city water works; and this defendant alleges and insists that if any such supposed ordinance was pretended to be so passed, as alleged in said petition, that such ordinance was void, illegal, and of no effect, because the said ordinance and contract hereinbefore set forth was then a valid and subsisting contract between the city of Chicago and this defendant, and the said city of Chicago and the council thereof were without any right, power, or authority to change the terms of the said ordinance and contract, which fixed a rate to be charged by this defendant to the inhabitants of that part of the city of Chicago formerly comprised in said village of Rogers Park and including the premises in said petition set forth; and this defendant alleges and insists that by reason of the premises the said supposed ordinance was and is utterly void, without any force, effect, or legal authority whatever.

This defendant admits that the petitioner did, on or about the 11th day of December, A. D. 1897, tender to this defendant the said sum of eight dollars and $\frac{72}{100}$ths ($8.72), and requested and demanded that this defendant turn the water from its said water main in said Sheridan road or drive into the supply pipe leading to said dwelling-house so as to supply water to the petitioner; and this defendant admits that it demanded of said petitioner that he pay to it the amount of money so fixed and established by the said ordi-
69 nance and contract then existing and in full force and validity, as above set forth, between this defendant and the city of Chicago, of all of which the petitioner then and there had notice, but that to pay the said sum the petitioner then and there refused. Wherefore, for want of a sufficient tender and payment in that behalf, this defendant refused to turn on the said water and to supply the petitioner therewith; and this defendant says that the petitioner is deprived of the said water by means of his own wrongful neglect and refusal to pay to this defendant the amount of its just, reasonable, and lawful charges in that behalf, and not otherwise; and this the defendant is ready to verify. Wherefore it prays that the said petition may be dismissed, and that it may go thereof without day, and may recover its costs and charges in this behalf by it most wrongfully expended.

ROGERS PARK WATER COMPANY,
By PARTRIDGE & PARTRIDGE,
Its Attorneys.

2 Ans. And for a further answer in this behalf the defendant says that the said petitioner ought not to have or maintain his aforesaid petition against this defendant, because it says that before the time when, etc., and after the said water main or pipe had been laid and constructed in front of the said premises in Sheridan road or drive, in said city of Chicago, and, to wit, on or about the 17th day of May, 1897, in said county, the said petitioner represented and stated

himself to be the owner of said premises and applied to the
70 defendant and requested it to permit an opening or tap to be made and placed in the said water main and a connecting pipe to be laid between the said water main and the fixtures for the use of water contained in said premises and dwelling-house; and thereupon said petitioner made a written application to this defendant for the purpose aforesaid, which application was thereupon accepted by the defendant and which application and acceptance thereof constituted a contract between the said petitioner and this defendant, and which application then and there was made, executed, and delivered by the petitioner to the defendant, and which application was in writing and was in substance as follows:

APPLICATION No. 681.

Application for a Supply of Water.

ROGERS PARK, ILL., *May* 17, 1897.

To superintendent Rogers Park Water Company:

I, the undersigned, hereby request and contract for a supply of water from the company's mains to premises known as lot 7, block 9, No. 3229 Sheridan road, located on the west side of Sheridan road, between Devon and Albion Ave., in said village, for use and from fixtures as enumerated on the margin hereof; said water to be supplied subject to the rules and regulations of said company now in force or which may hereafter be enacted or adopted, which rules and regulations are hereby made and declared to be a part of the contract between me and said company for supplying said premises with water.

J. B. FERGUS, *Owner.*

1 tap, 1 street washer or sill cock, 3 basins, 1 bath-tub, 2 water-closets, 11 rooms, 100 feet front lawn.

71 And this defendant says that before and at the time of the said application the water rates prescribed by said rules and regulations to be paid by the inhabitants of that part of the city of Chicago formerly comprised within said village of Rogers Park and including the said premises were and ever since have been as follows:

Barber shop, first chair	$5.00
Barber shop, each additional chair	3.00
Bath-house, public, each	7.00 to 15.00
Bath, private, each tub	3.00
Bath, boarding-house, each tub	5.00
Blacksmith shop, one fire	4.00
Blacksmith shop, each additional fire	3.00
Boarding and lodging houses and furnished rooms, per room	1.00
Boarding schools, per room	1.00

Butcher shops, engines and boilers extra	7.00 to 15.00
Dental office	6.00 to 10.00
Drug stores	10.00 to 25.00
Dwelling-houses, 5 rooms or less for family	6.00
Dwelling-houses, each additional room	1.00
Eating-houses	10.00 to 25.00
Fountains flowing not exceeding 3 hours per day during the season from 1st of April to 1st November, one-sixteenth orifice	8.00
Fountains, one eight-jet for the season as above	10.00
Hose for sprinkling streets, including washing and sprinkling sidewalks, the outsides of buildings, per lineal front foot; business houses, per season of 6 months	15.00
Same as foregoing, private house, per front foot	10.00
Hose for sprinkling lawn, 66 feet frontage	5.00
Hose for sprinkling lawns, each front foot in excess of 66 feet	.05
Hotels, per room	1.00
Livery, sale, and feed stables, per single stall, including carriage-washing	3.50
Private stable, 1 horse, including carriage-washing	3.00
Private stables, each additional animal	1.50
Stores not specified otherwise, 22 feet front, first floor	7.00
Stores, each additional floor	3.50
Stores, each additional front foot	.50
Urinals *and* hotels, boarding-houses	6.00
Urinals in blocks, mfg. establishments	4.00
Urinals in stores, banks, and offices	3.00
Urinals in private houses	3.00

Urinals with constant flow, special rates.

Wash-basins, stationary, first basin in private family free; all others, each	3.00
Water closets, per bowl	3.00
Water-closets, public, per bowl	5.00

Yard hydrants at dwelling or boarding-house rates.

All persons not satisfied at the schedule rates can have the privelege of putting in a water meter at their own expense.

73 *Meter Rates.*

Less than 300 gals. per day, per 100 gals	.050
300–400 gals. per day, per 100 gals	.045
400–1,000 " " " " " "	.040
1,000–3,000 " " " " " "	.035
3,000–5,000 " " " " " "	.030
5,000 gals. and upwards, per 100 gals	.025
10,000 gals. and upwards, per 100 gals	.020

Rates for all other purposes that may be applied for, not named in the foregoing schedule of maximum rates, will be fixed by esti-

mation or meter, at the option of the grantee or assigns. Of all of which the petitioner then and there had notice, and the defendant says that the said premises in said petition referred to are the same premises hereinabove described, and that thereupon this defendant accepted said application and caused and permitted the said main to be tapped and the said connection to be made therewith for a supply of water to said premises, and that the said petitioner thereupon paid to the defendant the regular rates prescribed by the rules and regulations for the use of a supply of water to said dwelling-house and premises for the period beginning May 1, 1897, and ending Nov. 1, 1897, being the sum of — dollars.

This defendant avers and insists that by reason of the premises a contract between the said petitioner and the defendant was made and entered into with respect to a supply of water by the defendant to the petitioner for the said premises and dwelling-house during such time and for so long a time as the petitioner should *devise* the said water to be so supplied; that the petitioner is entitled
74 to have a supply of water to himself and to the said premises and dwelling-house continued upon the terms and conditions of the said contract and not otherwise; and this defendant avers that it has been at all times ready and willing and still is ready and willing to supply water to said premises upon the terms prescribed in and by said contract, of all of which the petitioner then and there had notice; but that to comply with the *the* said contract on his part, and to pay the sum of money in and by said contract *on his part, and to pay the sum of money in and by said contract*, and the said rules and regulations called for and required the said petitioner neglects and refuses, and that it is solely by reason of such neglect and refusal on the part of the petitioner that the supply of water has been discontinued and cut off from the said premises by the defendant. Wherefore the defendant says that the petitioner is deprived of the said supply of water solely by reason of his own wrong; and this the defendant is ready to verify. Wherefore it prays judgment, etc.

ROGERS PARK WATER COMPANY,
By N. A. PARTRIDGE, *Its Attorneys.*

75 STATE OF ILLINOIS, } ss.:
County of Cook, }

Albert H. Trull, being first duly sworn, on oath says that he is the stenographer in the employ of Partridge & Partridge, attorneys for the defendant in the above-entitled cause, and that he wrote the original answer of said defendant, which was filed January 13th, 1898, to the petition herein, and that the above and foregoing is a full, true, and correct copy thereof; and further affiant saith not.

ALBERT H. TRULL.

Subscribed and sworn to before me this fourth day of February, 1898.

[SEAL.]

LEO W. WHEELER,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } Petition for Mandamus.

Amended Answer.

3rd Ans. Now comes the defendant, The Rogers Park Water Company, a corporation, etc., by Partridge & Partridge, its
76 attorneys, and by leave of court in that behalf first had and obtained files this its amended answer unto the said petition of John B. Fergus heretofore filed in the above-entitled cause, and by like leave of court *replies* herein as part of its amended answer the answer heretofore filed by said defendant in said cause.

And for a further answer in this behalf to the said petition, by like leave of court, the defendant says that the petitioner ought not to have or maintain his aforesaid action against this defendant, because it says that before the said time when, etc., the said village of Rogers Park, then and there being a municipal corporation under the laws of the State of Illinois, and on or before the said 12th day of November, A. D. 1888, was desirous of obtaining a supply of water for public use, and that the said village was then and there prohibited by law from raising the amount of money by public taxation necessary and requisite to build, equip, and operate the necessary system of water works, with appliances for pumping and distributing water requisite for a water supply for fire protection and for the use of the inhabitants of said village, and thereupon, for the purpose of obtaining a supply of water for public use, as aforesaid, in the manner and form by statute provided, the board of trustees of the said village of Rogers Park before said 12th day of November, 1888, applied to one H. E. Keeler to build, equip, construct, and maintain and operate a system of water works, with all appliances for pumping and distributing water, in said village of Rogers Park, and thereupon and for the purpose aforesaid the said
77 board of trustees of said village of Rogers Park did on the 12th day of November, 1888, pass a certain ordinance; which ordinance was on the same day duly approved in writing by the president of the said village of Rogers Park, and which ordinance is entitled and in substance is as follows:

An ordinance to provide for a supply of water to the village of Rogers Park, Ill., and its inhabitants, contracting with H. E. Keeler, his successors and assigns, for a supply of water for public use, and giving the said village of Rogers Park, Ill., an option to purchase the said works.

Be it ordained by the board of trustees of the village of Rogers Park, Cook county, Illinois.

SECTION 1. That in consideration of the public benefit to be de-

rived therefrom, the village of Rogers Park, Illinois, hereby grants their exclusive right and privilege for a period of thirty years from the time that this ordinance takes effect unto H. E. Keeler, his successors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and the said village hereby grants the exclusive right of using the streets, alleys, public squares and all other public places within the corporate limits of said village as they now exist, or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for furnishing, storing and conducting an adequate supply of good wholesome, clear water to the said village and
78 its inhabitants for public and private use, and for making repairs and extensions to the said system from time to time during the period in which this ordinance shall be in force.

The said grantee, his successors and assigns, shall exercise care and diligence in the use of the said streets and alleys, public squares and other public places, and shall cause no unnecessary obstruction of, or interruption of the public travel over or upon same or any injury to, or interference with any pipes, mains or sewers which may now be lawfully located beneath the surface thereof.

The said grantee, his successors and assigns, shall take due precaution to provide against danger to life and limb by reason of the exercise of their rights and privileges, and shall cause all excavations and obstructions to be properly lighted and guarded at night, and after the completion of the purpose, for which said streets, alleys, public squares and other public places may be used, they shall be restored to their former condition as near as may be without unnecessary delay.

The said grantee, his successors and assigns, hereby agree to hold the said village harmless from liability which may result to it by reason of any violation of this section.

SECTION 2. The general plan of the system of the said water works shall be as follows: same to be subject to approval of the village board of trustees.

Mains.—These shall be ample in size to supply water to meet the demands for water, for fire and domestic purposes and shall vary in diameter from 12 inches to 4 inches.

79 They shall be of the best quality of cast-iron pipe and will be tested at the foundry to a pressure of three hundred (300) pounds to the square inch, and shall be tested after the works are completed to a pressure of 125 pounds per square inch, as shown by a guage attached to a hydrant near the Chicago & Northwestern Railroad depot, and remain tight under said pressure, provided that no single lenght of four-inch main longer than eight hundred (800) — shall be constructed and laid.

Hydrants.—These shall be of the best kind and quality manufactured shall be provided with two hose nozzles and shall be frost-proof. They shall be strong enough to stand the same test as those provided for the mains. The grantee or assigns shall

furnish at their expense sixty hydrants with their branch castings and connections and located in such places upon the first five miles of mains as the trustees may direct. Said location to be made within thirty days after the acceptance of this ordinance, and if the village shall at any time in the future elect to place intermediate hydrants on the said first five miles of mains such hydrants shall be placed by the grantee or assigns at the expense of the village, and the village shall pay the necessary expense of keeping them in order, but shall pay no rent therefor. Those furnished and located at the time the mains are laid shall be erected and connected with the mains by the grantee or assigns. Those furnished and located thereafter shall be erected and connected with the mains by the grantee or assigns, but the cost thereof shall be paid by the village of Rogers Park. Said hydrants shall be under the sole charge for said village, of the chief of
80 the fire department, and all repairs and damages except those caused by ordinary wear and tear shall be repaired by said grantee or assigns, and the actual cost of said repairs shall be paid by said village.

Gates and valves.—These shall be of the best quality, and shall stand successfully the test prescribed for the mains.

Pumps.—The pumping machinery used shall be one compound and one high-pressure duplex pumping engine, and shall at the outset have a capacity sufficient for fulfilling the terms and conditions of this ordinance, same to be of not less than 1,500,000 gallons capacity in 24 hours, and shall have boilers of capacity to furnish sufficient steam for them when running at full speed. It and its appurtenances shall be of the best make, strong and durable. It will be kept in good working order at all times, saving unavoidable accidents, and its total capacity shall be increased from time to time as the needs of the village may require. It will be so arranged that the connection with stand-pipe may be closed instantly and that it will pump directly into the mains.

Stand-pipe.—This shall be built of steel, and shall be not less than 12 feet in diameter. Its top shall be not less than 100 feet above the elevation of the ground in front of the C. & N. W. R. R. depot in said village of Rogers Park. It shall at all times be kept as nearly full as is practical.

SECTION 3. In consideration of the public benefits and the protection to property resulting from the construction of the said
81 system of water works, the said village hereby agrees to pay an annual rental for fire protection to the said grantee, his successors or assigns, for not less than five miles of mains within the corporate limits of said village, for the aforesaid period of thirty years, at the annual rate of five hundred and seventy-five ($575) dollars for each mile of mains, to be payable semi-annually on the first day of January and July in each year.

In further consideration the village of Rogers Park agrees to pay all municipal or village taxes which may be assessed against the plant of the said grantee, assigns, for the first ten years the water works are operated. The rental for fire protection of mains in excess

of the first five miles laid, as hereinafter provided at the request of the said village shall be at the annual rate of four hundred dollars for each mile of mains, payable as aforesaid during the unexpired period of the said original term of thirty years. The rental shall begin at such time as the said grantee or assigns shall begin to maintain continuously a pressure of 40 pounds a square inch. Water shall be used from the hydrants for the extinguishment of fires, and for flushing sewers only. In flushing sewers automatic devices may be used and so regulated that they shall not discharge more than 60 gallons each per day, and, that there shall not be more than ten for each mile of mains, and the same shall always be kept in working condition by the village and all waste of water prevented. The village shall have also the right to use water from all the public hydrants during the full term and continuance of this franchise and contract for the purpose of flushing public sewers and gutters whenever the said village shall deem it necessary for sanitary purposes, upon giving notice to said grantee or assigns at the pumping station. Said flushing to be done by the village through hose and fire nozzle only, but there shall not be more than two hydrants open at one time for such purpose, and no one hydrant shall be opened oftener than twice a week and not longer than twenty minutes at one time for such purpose, and there shall be no flushing in the time of fire. The village shall use the water provided in all of above cases in a reasonable manner and without unnecessary waste. Said grantee, his successors and assigns hereby agree to furnish without additional charge, in consideration of franchise and rentals, hereby agreed to be paid by said village, water sufficient to supply two public drinking fountains for the use of man and beast. The supply pipe of each shall not be larger than one-half inch in diameter, to be constructed at such places in said village as said village board may direct. Also one jet fountain of not to exceed ½-inch orifice in each of the public parks of said village; also water sufficient to supply each of the public schools in said village, and also at the public offices of said village and for the use of the fire department at the engine-house of said village. The said village agrees to furnish said fountains, faucets, etc., and furnish all material and pay the expenses of connecting same with the mains of grantee or assigns, and to use every precaution to prevent all waste of water.

82

83 SECTION 4. Said grantee, his successors and assigns, in consideration of the rentals herein agreed to be paid and in consideration of the rights and privileges granted, expressly agrees on its part to furnish to said village of Rogers Park, and to the residents thereof, an adequate supply of good, wholesome and clear water fit for culinary and drinking purposes; said water to be taken from Lake Michigan at such a point near the north boundary line of said village as will best insure its freedom from sewerage contamination, and it shall be filtered by the most modern and by an acceptable process before being delivered into the mains for supplying said village, and if said grantee, his successors and assigns shall

fail at any time to furnish a supply of water to the said village and the residents thereof, of the quality and quantity provided for in this ordinance, then all rentals to be paid by said village to said grantee or assigns shall cease until said grantee or assigns shall provide and supply water of the degree of purity and in the quantity provided for in this ordinance; and also provided that should said grantee or assigns fail to supply water of the quality and quantity and in the manner aforesaid to said village and its inhabitants for a greater length of time than one year at any one time, and after having been given due notification by said village that the authorities of said village consider the supply of water, either in quality or quantity, not in compliance with this ordinance then the said grantee or assigns shall forfeit and surrender to said village its said franchise and all other rights and privileges granted under this ordinance, and the contract herein entered into shall be null
84 and void. Said grantee or assigns further agrees to furnish such steam as may be needed for running one or more air-compressors to be furnished by said village and located in the pumping station of said grantee or assigns; the total power used by said air-compressors shall be at the outset not to exceed ten-horse power. All power in excess of that above provided which said village may need for running air-compressors, shall be furnished by said grantee or assigns at a cost of seventy-five dollars per horse-power per annum.

SECTION 5. Upon the completion of the construction of the said system of water works, the said grantee or assigns shall notify the board of trustees of said village to that effect and thereupon submit the works to such a test as will show the capacity of the works to be sufficient to throw water through 100 feet of 2½-inch hose and one-inch nozzle from each of six different hydrants not located on the same main to a height of 90 feet above the level of the ground at the C. & N. W. R. R. depot when the air is still. The performance of this test shall be a fulfillment by the grantee or assigns of the terms and conditions of this ordinance as far as relates to strength and capacity. Said grantee and assigns shall so maintain and enlarge said water works that they will at all times be capable of performing such tests and said village board shall have the right to order a repetition of such tests annually by giving said grantee or assigns a written notice of thirty days, and a failure on the part of said grantee or assigns to make such test shall cause a suspension of said rental until said grantee successfully performs such test.

85 SECTION 6. Within sixty days after the day that this ordinance takes effect, the said grantee or assigns shall file a written acceptance thereof in the office of the village clerk and at least $5,000.00 work and material on said works shall be done and furnished before December 31, 1888. The construction of said water works shall be commenced within 60 days after this ordinance takes effect, and the said water works shall be completed within one year after the commencement of the construction thereof, provided, however, that the time during which said grantee or assigns are

delayed by strikes, floods, act of God, or the public enemy, legal proceedings for the maintenance or defense of their rights or in the acquisition of property water rights, right of way, mutinous interference or by reason of any other cause whatever beyond its control, shall form no part of the time limited in this ordinance for the performance of any act required by the terms hereof to be done by them.

SECTION 7. The said village board of trustees shall from time to time pass an- enact ordinances, under suitable penalties, providing for the protection of said works from damage, fraud or imposition.

SECTION 8. At the expiration of ten years after the completion of the said works, and at the expiration of each succeeding period of five years thereafter, the said village shall have the right and privelege to purchase said system of water works, provided they notify the said grantee or assigns of their intention so to do at least six months before the expiration of said period or periods of years.

86 The value of said system shall be ascertained as follows:

The said grantee or assigns and the said village shall each appoint one person, and the two appointees shall cho-se a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of the said system of water works. In case the two experts chosen disagree upon the selection of the third he shall be appointed by the judge of the circuit court of some adjoining circuit. None of the board shall be residents of Rogers Park, Ill. The said board in fixing the value of said works shall take into consideration the value of the franchise, the value of water rights and right of way, the revenue from the works and all other facts and considerations legitimately connected with the said works. The said village shall within sixty days after the said board has rendered its decision pay the amount awarded in cash, and upon such payment said grantee or assigns shall transfer to the said village all their said rights and privileges and property included *to* the said appraisement.

SECTION 9. The said grantee or assigns shall make extension of mains, whenever called upon to do so by the village board of said village, provided however, that said extensions shall not be less than 500 feet in length, and further provided that there shall be one water consumer for each 100 feet along the line of such extension

87 who shall agree to take water at the established rates for a period of at least two years, but as a condition of making such extensions the village agrees to pay for public fire service upon such extensions at the rate of four hundred dollars per annum for each mile of such extension for the unexpired term of this franchise and contract.

SECTION 10. After the said works are put in operation if at any time the said grantee or assigns are unable to provide a fire pressure of 60 pounds on the distributing mains at the said C. & N. W. R. R. depot for a period of two weeks in succession, then the rental for the use and employment of the mains for the purpose aforesaid

shall cease until such standard of pressure shall be attained. Nothing herein contained shall be so construed as to prevent the said grantee or assigns from temporarily shutting off the water from its said system or any portion thereof for the purpose of making repairs or extensions to the same, and no liability shall attach to the said grantee or assigns for the suspension of the supply of water, provided the repairs or extensions are made and the water turned on again without unnecessary delay.

SECTION 11. The said grantee or assigns shall have the right to make, alter, amend and enforce rules for governing the connections with their mains, and the use of the water and for preventing the waste of water.

SECTION 12. The said grantee or assigns shall charge the following annual water rates to consumers of water during the
88 existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer and to charge and collect from him at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be five dollars.

Tariff of Water Rates.

Barber shop, first chair	$5.00
Barber shop, each additional chair	3.00
Bath-house, public, each	7.00 to 15.00
Bath, private, each tub	3.00
Bath, boarding-house, each tub	5.00
Blacksmith shop, one fire	4.00
Blacksmith shop, each additional fire	3.00
Boarding and lodging houses and furnished rooms per room	1.00
Boarding schools, per room	1.00
Butcher shops, engines & boilers extra	7.00 to 15.00
Dental office	6.00 to 10.00
Drug stores	10.00 to 25.00
Dwelling-houses, 5 rooms or less for family	6.00
Dwelling-houses, each additional room	1.00
Eating-houses	10.00 to 25.00
Fountains flowing not exceeding 3 hours per day during the season from 1st of April to 1st November, one-sixteenth orifice	8.00
Fountains, one eight-jet for the season as above	10.00
Hose for sprinkling streets, including washing and sprinkling sidewalks, the outside of buildings per lineal
89 front foot, business house per season of 6 months	15.00
Same as foregoing private house per front foot	10.00
Hose for sprinkling lawns, each front foot in excess of 66 feet	.05
Hotels, per room	1.00
Livery, sale and feed stables, per single stall including carriage-washing	3.50
Private stables, 1 horse including carriage-washing	3.00
Private stables, each additional animal	1.50

Stores not otherwise specified, 22 feet front first floor	7.00
Stores, each additional floor	3.50
Stores, each additional fron- foot	.50
Urinals *and* hotels, boarding-houses	6.00
Urinals in blocks, mfg. establishments	4.00
Urinals in stores, banks and offices	3.00
Urinals in private houses	3.00

Urinals with constant flow, special rates.

Wash-basins, stationary, first basin in private family free, all others each	3.00
Water-closets per bowl	3.00
Water closets, public per bowl	5.00

Yard hydrants at dwelling or boarding-house rates.

All persons not satisfied at the schedule rates can have the privilege of putting in a water meter at their own expense.

90 *Meter Rates.*

Less than 300 gals. per day, per 100 gals	.050
300–400 gals. per day per 100 gals	.045
400–1,000 " " " " " "	.040
1,000–3,000 " " " " " "	.035
3,000–5,000 " " " " " "	.030
5,00– gals. and upwards per 100 gals	.025
10,00– gals. and upwards per 100 gals	.020

Rates for all other purposes that may be applied for not named in the foregoing schedule of maximum rates will be fixed by estimation or meter, at the option of the grantee or assigns.

SECTION 13. A sufficient tax shall be levied and collected annually upon all taxable property in the village subject by law to such taxation to meet the payments under this ordinance as they may respectively mature, during the existence of any contract for public fire service, which tax shall be irrepealable from and after the passage of this ordinance, and in case the village shall be authorized to levy a special tax for such purpose, such tax shall be annually levied and the proceeds thereof shall be kept as a separate fund to be known as a fire-hydrant fund, and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed except that any excess of said tax in any one year over the amount necessary to pay rentals for such year may be used for any purpose that — village of Rogers Park may direct.

91 SECTION 14. Within sixty days after the passage of this ordinance said H. E. Keeler, his successors and assigns shall file with the village an acceptance of the same, which acceptance duly acknowledged before some officer duly authorized to administer oaths shall have the effect of a contract between the village and said H. E. Keeler, his successors or assigns.

Approved Nov. 12, A. D. 1888.

HENRY P. DALY,
President Board of Trustees.

Passed Nov. 12, A. D. 1888.

JOHN L. HEALY,
Village Clerk.

And which said ordinance was duly published according to law, so that the same became, was, and is a valid ordinance of the said village of Rogers Park.

That it was well known and understood by the said village of Rogers Park and the said board of trustees thereof that said H. E. Keeler, the grantee under said ordinance, was not possessed of sufficient means to build the said water works out of his own private means, and that the said ordinance was passed to enable the said Keeler to negotiate with other persons on the faith of the said ordinance and all the matters and things therein stipulated, provided, and agreed on the part of the said village, to obtain the necessary capital to build, equip, and operate the said system of water works, and that it was then and there well known by the said village and the board of trustees thereof that the only means to make an
92 investment of capital in the said system of water works profitable, and to repay the investment required to be made in that behalf, was by means and virtue of the rates in said ordinance provided to be paid by said village as hydrants' rental and by the rates to be paid by the inhabitants of said village who applied for and obtained a supply of water from the said water works for domestic use or business purposes, and that the territory comprised in said village was and is mostly a residence district, so that one of the main sources of revenue, it was then well known, would be, and in fact ever since has been, the rates paid by owners and occupants of residences within the said territory for a supply of water for domestic use.

That thereupon said Keeler negotiated with different persons to become stockholders in a corporation to be organized for the purpose of building and operating the said water works in said ordinance provided for, and to purchase the bonds of said company, and that relying upon the rights, benefits, and privileges, franchises, and immunities granted by or contained in the said ordinance, and particularly upon the rates therein provided to be paid by the said village and by the inhabitants thereof for a supply of water, as hereinabove set forth, a large number of persons did associate themselves together for the purpose of forming a corporation known as The Rogers Park Water Company, the present defendant herein, and did negotiate the sale of bonds of said company to provide the means to build, equip, and put in operation the said system of water works, including not less than five miles
93 of mains within the corporate limits of said village; and thereupon the said H. E. Keeler did afterwards, and on or about the 8th day of January, 1889, present to the said board of trustees and file with the clerk of said village his acceptance of the said ordinance, and which acceptance was in substance as follows:

CHICAGO, *Jan.* 8, 1889.

To the board of trustees, village of Rogers Park, Ill.

DEAR SIRS: I hereby accept as per section 14 the ordinance passed and approved Nov. 12th, 1888—An ordinance to provide for a supply of water to the village of Rogers Park, Ill., and its inhabitants, contracting with H. E. Keeler, his successors and assigns, for a supply of water for public use, and giving the said village of Rogers Park, Ill., an option to purchase the said works.

Yours respectfully, H. E. KEELER. [SEAL.]

STATE OF ILLINOIS, } *ss:*
County of Cook, }

I, Louis Danziger, a notary public in and for said county, in the State aforesaid, do hereby certify that H. E. Keeler, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

94 Given under my hand and notarial seal this ninth day of January, 1889.

LOUIS DANZIGER,
Notary Public. [SEAL.]

This defendant further admits that it is a corporation duly incorporated on or about the 24th day of January, 1889, under the statutes of the State of Illinois, having for the object of its incorporation, among other things, to locate, construct, and operate a system of water works, with all appliances for pumping and distributing water, in the village of Rogers Park, in said Cook county and State of Illinois, and its vicinity, and to own real estate used in connection therewith.

Further answering, this defendant alleges that on or about the 31st day of January, 1889, the said H. E. Keeler, the grantee named in said ordinance passed on the 12th day of November, 1888, by the board of trustees of said village of Rogers Park, duly assigned his rights and privileges under the said ordinance to this defendant, and that thereupon it became possessed of all the rights and privileges and benefits, franchises, and immunities granted by or contained in the said ordinance or belonging to or in anywise growing out of the same, as assigned by said grantee, and that this defendant has ever since been and now is so possessed.

This defendant admits that in pursuance of the said object of its incorporation this defendant did soon after its incorporation

95 erect, construct, and put in operation a system of water works, with all appliances for pumping and distributing water, in said village of Rogers Park, including water mains and supply pipes in the public streets of said village and in that part of the city of Chicago which was formerly the village of Rogers Park; and this defendant alleges that each and all of said acts and things

were done by the authority of the said ordinance hereinabove set forth, and not otherwise; and this defendant alleges and insists that thereupon, and by virtue of the passage of the said ordinance, and the acceptance by the said grantee therein named, and the said assignment and acceptance thereof by this defendant, that the said ordinance, together with the rights, privileges, benefits, and immunities therein and thereby granted, became and constituted a contract between this defendant and the said village of Rogers Park and the city of Chicago.

That upon the completion of the construction of said system of water works the defendant notified the board of trustees of said village to that effect, and thereupon submitted the said works to the test in and by said ordinance, by section five thereof, provided, and that thereupon the said system of water works was accepted by the said village of Rogers Park, and thereafter and ever since the hydrant rental in said ordinance reserved has been paid by the village of Rogers Park previous to the annexation thereof to the city of Chicago and by the city of Chicago ever since the said annexation, as is in and by said ordinance provided.

That in and by the ninth section of said ordinance it is
96 provided that said grantee or assigns shall make extensions of mains, whenever called upon to do so by the village board of said village, upon the terms and conditions in said ordinance provided, and that from time to time, by virtue of the said provisions requiring extensions to be made, this defendant has extended its lines of mains in said village until now about thirteen miles of additions to said water mains have been made in addition to the five miles originally provided for, so that about eighteen miles of water mains, including extensions belonging to this defendant, are now in operation and service for the supply of water to the territory in the city of Chicago formerly comprised within said village of Rogers Park; that a large part of said extensions have been made by the order of the common council of the city of Chicago, and that the said city of Chicago pays to this defendant the hydrant rentals upon said extensions reserved in and by the said ordinance.

That on or about the 25th day of January, 1897, a certain order was passed by the common council of the city of Chicago, calling upon this defendant to extend a water main in the said street known as the Sheridan road or drive in front of the premises in said petition described; and thereupon, in compliance with said order, this defendant proceeded to lay and extend the said water main, and that the said extension was accepted by the city of Chicago, and hydrant rental has been paid thereon ever since by the city of Chicago, as is in and by the said ordinance provided.

That the petitioner actively interested himself to prevent the said extension from being made, and applied to alderman of the city of Chicago and objected to the passage of said order, and tried
97 to prevent the same from being passed, and protested against the passage of the said order and the laying of the said main or pipe for the distribution of water in said street.

That long before the time when the said order was passed and

the said water pipe or main was laid, as is above set forth, the said house in said petition described contained all the fixtures for the use of water in said petition described, and that petitioner obtained a supply of water during all that time by means of a well and pump provided for that purpose, and that the petitioner is now in the full and complete enjoyment of all the said fixtures and of a supply of water by and through the same means provided and used by him for that purpose.

That the water rates demanded by this defendant from the petitioner, as is in said petition set forth, were and are the same rates in and by said ordinance prescribed and fixed, and not other or different rates, and that the said rates were and are the lawfully established rates which this defendant has a right to charge and demand of and from the petitioner in order to entitle the petitioner to obtain a supply of water from the said water works of this defendant, and that this defendant is entitled to and does demand the said sum, to wit, thirteen dollars and fifty cents ($13.50), of and from the petitioner, being its customary and lawful rates for a like service.

That the said ordinance, together with the acceptance thereof and the construction, maintenance, and operation of the said water works, together with the acceptance thereof by said village
98 of Rogers Park and the city of Chicago, as hereinabove set forth, including the extensions so made from time to time, constitutes and is a contract between the defendant and the city of Chicago, which contract, together with all rights, privileges, franchises, and immunities by said ordinance conferred, is the property of the defendant and as such is entitled to the protection of the statutes and laws of the State of Illinois, and particularly to the protection given in and by the constitution of the State of Illinois, in the second section of the second article thereof, which provides that no person shall be deprived of property without due process of law, and also by the fourteenth section of the same article, which prohibits the passage of any law impairing the obligation of contracts, and which contract, rights, privileges, franchises, and immunities are in like manner under the protection of the Constitution of the United States contained in the tenth section of the first article thereof, which in like manner forbids any State to pass any law impairing the obligation of contracts, and of the provision contained in the first section of the fourteenth article or amendment to said Constitution, which provides that no State shall deprive any person of property without due process of law, so that the defendant claims and insists that the city of Chicago was and is without any power whatever to pass the said ordinance in said petition referred to and which is therein alleged to have been passed on October 4th, 1897, and insists that if any such supposed ordinance
99 was pretended to be so passed, as alleged in said petition, that such ordinance was void, illegal, and of no effect.

That the petitioner has not received a supply of water from the defendant solely by reason of his wrongful refusal and neglect to pay the usual, customary, and lawful charges of the defendant for

the said supply of water to him, and not otherwise; and this the defendant is ready to verify. Wherefore it prays judgment, etc.

ROGERS PARK WATER COMPANY,
By PARTRIDGE & PARTRIDGE, *Its Attorneys.*

And thereupon, on the same day, to wit, the 28th day of January, A. D. 1898, three certain demurrers were filed in the office of the clerk of said court in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County, January Term, 1898.

JOHN B. FERGUS
vs. } Mandamus.
ROGERS PARK WATER COMPANY.

First Demurrer to First Answer.

100 And now comes said petitioner, by Jesse B. Barton, his attorney, and demurs to so much and such part of the said first answer of defendant herein amended and refiled as follows:

"Further answering, this defendant denies that on October 4th, 1897, or on any other day, the city council of the city of Chicago passed any legal and valid ordinance in which it was ordained that the maximum rates and charges for the supply of water furnished by this defendant to the inhabitants of that part of the city of Chicago in which this defendant has been or might be authorized to lay water mains and supply pipes were established or fixed so as to be uniform and equal to those charged by the city of Chicago for water supply from the Chicago city water works; and this defendant alleges and insists that if any such supposed ordinance was pretended to be so passed, as alleged in said petition, that such ordinance was void, illegal, and of no effect, because the said ordinance and contract hereinbefore set forth was then a valid and subsisting contract between the city of Chicago and this defendant, and the said city of Chicago and the council thereof were without any right, power, or authority to change the terms of the said ordinance and contract, which fixed a rate to be charged by this defendant to the inhabitants of that part of the city of Chicago formerly comprised in said village of Rogers Park and including the premises in said petition set forth; and this defendant alleges
101 and insists that by reason of the premises the said supposed ordinance was and is utterly void, without any force, effect, or legal authority whatever."

JESSE B. BARTON,
Petitioner's Attorney.

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County, January Term, 1898.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } Mandamus.

Second Demurrer to First Answer.

And now comes the said petitioner, by Jesse B. Barton, his attorney, and demurs to so much and such part of the said first answer of defendant herein amended and refiled as follows:

"This defendant avers and insists that by reason of the premises a contract between the said petitioner and the defendant was made and entered into with respect to a supply of water by the defendant to the petitioner in the said premises and dwelling-house during such time and for so long a time as the petitioner should desire the water to be so supplied; that the petitioner is entitled to
have a supply of water to himself and to the said premises
102 and dwelling-house continued upon the terms and conditions of the said contract and not otherwise, and this defendant avers that it has been at all times ready and willing to supply water to said premises upon the terms prescribed in said contract, of which the petitioner then — there had notice, but that to comply with the contract on his part and to pay the sums of money in and by said contract and the said rules and regulations called for and required the said petitioner neglects and refuses on the *part* of the petitioner that the supply of water has been discontinued and cut off from the said premises by the defendant. Wherefore the defendant says that the petitioner is deprived of the said supply of water solely by reason of his own wrong.

JESSE B. BARTON,
Petitioner's Attorney.

STATE OF ILLINOIS, } ss:
County of Cook, }

Circuit Court of Cook County, January Term, A. D. 1898.

JOHN B. FERGUS
vs.
ROGERS PARK WATER WORKS. } Mandamus.

Demurrer to Third Answer.

And now comes the petitioner, by Jesse B. Barton, his attorney, and says that the third amended answer of said defendant
103 originally filed herein on the 28th day of January, 1898, as a further answer is not sufficient in law to be pleaded to or

traversed; and this he is ready to verify. Wherefore he prays judgment.

JESSE B. BARTON,
Petitioner's Attorney.

And thereupon, on the same day, to wit, the 28th day of January, A. D. 1898, a certain pleas was filed in the office of the clerk of said court in words and figures following, to wit:

STATE OF ILLINOIS, } ss.:
County of Cook, }

Circuit Court of Cook County, January Term, 1898.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } Mandamus.

And the petitioner, by Jesse B. Barton, his attorney, comes and as to the first answer of the said defendant amended and refiled herein says that he is ready to aver, maintain, and prove the allegations of his said petition as to the height of the dwelling-house in his said petition described and as to the various appliances and fixtures therein; and of this the petitioner put- himself upon the country.

JESSE B. BARTON,
Petitioner's Attorney.

104 And for a further plea in this behalf to said first answer petitioner, by his attorney aforesaid, says that he denies that the board of said village of Rogers Park on the 12th day of November, 1888, or at any other time, passed the ordinance in the said amended and refiled answer described, or any other ordinance of like term or effect; and of this he put- himself upon the country.

JESSE B. BARTON,
Petitioner's Attorney.

And for a further plea in this behalf to said first answer petitioner, by his attorney aforesaid, says that the said defendant did not by assignment or otherwise become possessed of any of the rights, benefits, or privileges, franchises, or immunities in said amended and refiled answer alleged to have been granted to said H. E. Keeler by said board of trustees; and of this he puts himself upon the country.

JESSE B. BARTON,
Petitioner's Attorney.

And for a further plea in this behalf to said first answer petitioner, by his attorney aforesaid, denies that any contract ever existed between said defendant and said village of Rogers Park or ever existed or nor exists between said defendant and the city of Chicago by reason of the said alleged ordinance, alleged to have

been passed by said board of trustees November 12th, 1888, or concerning anything therein contained; and of this he puts himself upon the country.

JESSE B. BARTON,
Petitioner's Attorney.

105 And for a further plea in this behalf to said first answer petitioner, by his attorney aforesaid, denies that the maximum water rates or charges due in said dwelling-house so occupied by petitioner, if uniform and equal in every particular with those charged by the city of Chicago for a supply of water from the Chicago city water works for the half year from November 1, 1897, to May 1, 1898, if paid on or before December 15, 1897, would amount to more than the sum of $8.72; and of this he puts himself upon the country.

JESSE B. BARTON,
Petitioner's Attorney.

And the petitioner, by his attorney aforesaid, comes, and as to the further and separate answer secondly amended and refiled of said defendant herein says that he denies that on the 17th day of May, 1897, or at any time thereafter, the rule- or regulations of said defendant prescribed the water rates in said further and separate amended and refiled answer set forth, or any other water rates; and of this he put- himself upon the country.

JESSE B. BARTON,
Petitioner's Attorney.

And afterwards, to wit, on the 29th day of January, A. D. 1898 a certain joinder in demurrer was filed in the office of the clerk of said court in words and figures following, to wit:

106 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } Mandamus.

And the defendant, by Partridge & Partridge, its attorneys, says that the said answers and each of them, to which the petitioner has demurred, are sufficient in law, and that, as a matter of law, the said demurrers and each of them ought to be carried back and be sustained to the said petition.

PARTRIDGE & PARTRIDGE,
Attorneys for said Defendant.

And afterwards, to wit, on the 10th day of February, A. D. 1898, a certain replication was filed in the office of the clerk of said court in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } Petition for Mandamus.

Replication.

And the defendant, The Rogers Park Water Company, by Partridge & Partridge, its attorneys, comes and defends, etc., and
107 as to the plea heretofore filed by said petitioner as to the height of said dwelling-house and as to the various appliances and fixtures therein, whereof the petitioner has put himself upon the country, the defendant does the like.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

And as to the plea by the petitioner secondly above pleaded, wherein said petitioner denies that the board of trustees of said village of Rogers Park, on the 12th day of November, 1888, or at any other time, passed the said ordinance in said answer described, or any other ordinance of like tenor or effect, whereof the petitioner has put himself upon the country, the defendant does the like.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

And as to the said plea by the petitioner 3rdly above pleaded, wherein the petitioner avers that the defendant did not, by assignment or otherwise, become possessed of any of the rights, benefits and privileges, franchises or immunities in said answer alleged to have been granted to said H. E. Keeler by the said board of trustees, and whereof the petitioner has put himself upon the country, the defendant does the like.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

108 And as to the plea by the petitioner 4thly above pleaded, wherein the petitioner denies that any contract ever existed between the defendant and said village of Rogers Park or ever existed or now exists between the defendant and the city of Chicago by reason of the said ordinance or concerning anything therein contained, the defendant says that the said pleas, as to the matters and things therein contained, are not sufficient in law, in manner and form as the same are therein set forth, to require the defendant to reply thereunto; and this it is ready to verify. Wherefore it demurs to the said plea and prays judgment, etc.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

And as to the plea by the petitioner 5thly above pleaded, wherein he denies that the maximum water rates due on said dwelling-house so occupied by petitioner, if uniform and equal with those charges by the city of Chicago for a supply of water from the Chicago city water works for the half year from Nov. 1, 1897, to May 1, 1898, if paid on or before December 15th, 1897, would amount to more than the said sum of eight dollars and $\frac{72}{100}$ths ($8 72), and whereof he has put himself upon the country, the defendant does the like.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

109 And as to the plea by the petitioner 6thly above pleaded, being the plea to the second answer of the defendant herein, wherein the petitioner denies that on the 17th day of May, 1897, or at any other time thereafter, the rules and regulations of the defendant prescribed the water rates in said answer set forth, or any other water rates, whereof the petitioner has put himself upon the country, the defendant does the like.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

And the defendant says that the said answers and the parts or portions thereof to which the petitioner has heretofore severally demurred are, and each of them is, sufficient in law; and this the defendant is ready to verify.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

And afterwards, to wit, on the 25th day of March, A. D. 1898, a certain verdict was filed in the office of the clerk of said court in words and figures following, to wit:

We, the jury, find the issues for the petitioner.

GEO. E. HARGREAVES, *Foreman.*

And thereupon, on the same day, to wit, the 25th day of March, A. D. 1898, the following proceedings were had and entered of record in said court, to wit:

110 *Order, March 25, '98.*

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } 178,846. Petition.

This cause being called for trial, come the parties, by their attorneys, respectively, and issues being joined, it is ordered that a jury come; whereupon come the jurors of a jury of good and lawful men, to wit, J. Caut, F. B. Cooker, G. E. Hargreaves, C. Frederick, H. Grollhendieck, M. W. Binse, E. M. Endicott, A. M. Goetz, A. M.

Calay, C. C. Becker, J. E. Allen, and S. Anderson, who, being duly elected, tried, and sworn well and truly to try the issues joined herein and a true verdict render according to the evidence, after hearing all the evidence adduced, say: We, the jury, find the issues for the petitioner. Whereupon the respondent enters herein its motion for a new trial in said cause. After arguments of counsel and due deliberation by the court, said motion is overruled and a new trial denied, and thereupon the defendant enters herein its motion in arrest of judgment; which motion is also overruled and denied.

Therefore it is considered by the court that a peremptory writ of mandamus do issue herein, commanding the respondent, Rogers Park Water Company, to receive from the petitioner herein the sum of eight dollars and seventy-two cents and turn on and supply water to the petitioner until the first day of May, A. D. 1898, in the dwelling-house on Sheridan road or drive occupied by the petitioner, and that the petitioner do have and recover of
111 and from the respondent, Rogers Park Water Company, his costs and charges in this behalf expended and have execution therefor.

Thereupon the respondent, having entered its exceptions herein, prays and appeal from the judgment of this court to the superior court in and for the State of Illinois, which is allowed upon filing herein its appeal bond in the penal sum of two hundred and fifty dollars, to be approved by the clerk of this court, together with its bill of exceptions, within twenty days from this date.

Be it remembered that heretofore, to wit, on the 21st and 27th days of December, A. D. 1897, the following proceedings were had and entered of record in said court, to wit:

Order, Dec. 21, '97.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } 178,846. Petition for Mandamus.

On motion of plaintiff's attorney, it is ordered that an alias summons do issue herein, returnable December 27th, 1897.

Order, Dec. 27, '97.

PEOPLE OF THE STATE OF ILLINOIS *ex Rel.*, etc.,
vs.
ROGERS PARK WATER COMPANY. } 178,846. Petition.

On motion of respondent's attorney, it is ordered that the time to plead herein be, and the same is hereby, extended ten days.

And afterwards, to wit, on the 8th, 17th, and 25th days of
112 January, A. D. 1898, the following proceedings were had and entered of record in said court, to wit:

Order, Jan'y 8, '98.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } 178,846. Petition for Mandamus.

This cause coming on to be heard upon the demurrer to the petition filed in said cause, after arguments of counsel and due deliberation by the court said demurrer is overruled, and it is ordered that the defendant be, and it is hereby, required to answer said petition within five days from this date.

Order, Jan'y 17, '98.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } 178,846. Mandamus.

On motion of petitioner's attorney, it is ordered that the defendant be, and is hereby, required to rejoin to the petitioner's plea of travers- filed in said cause to the defendant's answer within ten days from this date.

Order, Jan'y 25, '98.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } 178,846. Mandamus.

On motion of petitioner's attorney, it is ordered that leave be, and the same is hereby, given him to withdraw plea or traverse filed herein on January 18th, A. D. 1898, by the petitioner.

113 And leave is hereby given the defendant to file an amended answer herein by twelve o'clock Friday morning next.

And afterwards, to wit, on the 3rd, 5th, and 26th days of February, A. D. 1898, the following proceedings were had and entered of record in said court, to wit:

Order, Feb. 3, '98.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } 178,846. Mandamus.

This cause coming on to be heard on the petition of the petitioner herein, duly verified, for leave to file verified copies of the original petition and of the plea or traverse to the defendant's answer alleged to be lost or destroyed, and it appearing to the court that due and diligent search has been made for the original petition, the summons and alias summons, the appearance of defendant, the demurrer

of defendant to the said petition, the answer of defendant to said petition, the plea or traverse of said petitioner to said answer, and the demurrers of the defendant to said plea or traverse, and that the same cannot be, nor can any of them be, found, and that the same, all and each of them, is lost or destroyed—

Wherefore it is ordered by the court that permission be, and the same is hereby, granted to the petitioner to file herein instanter a verified copy of said petition and a verified copy of said plea or traverse, and that the same and each of them be taken and treated for all purposes the same as the originals of which they are respectively copies.

114 And it is further ordered that the said defendant file herein on or before 9.30 a. m. February 5th, 1898, true and substantial copies, duly verified as such, of the demurrer of said defendant to the petition herein, the answer to said petition, and the demurrers of said defendant to the plea or traverse of said defendant respectively, and that the same, when so filed, be taken and treated for all purposes the same as the originals of which they are respectively copies.

Order, Feb'y 5, '98.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } 178,846. Mandamus.

On motion of plaintiff's attorney, it is ordered that the defendant be, and it is hereby, required to reply, demur to, or join issue on petition filed herein by Thursday, February 10th, 1898.

Order, Feb'y 26, '98.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } 178,846. Mandamus.

This cause coming on to be heard upon the demur-s to the first and third answers filed herein, after arguments of counsel and due deliberation by the court said demurrers *is* sustained.

Thereupon the defendant elects to stand by its pleas.

115 And afterwards, to wit, on the 5th day of March, A. D. 1898, the following proceedings were had and entered of record in said court, to wit:

Order, Mar. 5, '98.

JOHN B. FERGUS
vs.
ROGERS PARK WATER Co. (a Corp.) } 178,846. Mandamus.

This cause coming on to be heard upon the demurrers interposed by the petitioners to the first and third answers of the defendant, herein filed, and also upon the demurrer interposed by the defend-

ant to the fourth plea of the petitioner to the first answer of the defendant filed herein, after arguments by counsel and due deliberation by the court it is ordered by the court that said demurrers of the petitioner be sustained; to which order and decision by the court the defendant, by its counsel, then and there duly excepted and elected to abide by its said answers.

And in like manner it is ordered by the court that the said demurrer of the defendant be overruled: to which order and decision of the court the defendant, by its counsel, duly excepted and elected to abide by its said demurrer.

And afterwards, to wit, on the 14th day of April, A. D. 1898, the following proceedings were had and entered of record in said court, to wit:

116 *Order, Ap'l* 14, '98.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } 178,846. Mandamus.

On the stipulation of the parties filed herein, it is ordered that the time to file the bill of exceptions herein be, and the same is hereby, extended to April 20th, 1898.

Be it remembered that on, to wit, the 14th day of April, A. D. 1898, a certain bill of exceptions was filed in the office of the clerk of said court in words and figures following, to wit:

STATE OF ILLINOIS, }
County of Cook. }

In the Circuit Court.

FERGUS
vs.
ROGERS PARK WATER COMPANY. }

John B. Fergus.
C. H. Ceperly.
W. W. McGaffey.

Filed April 14, 1898.

JOHN A. COOKE, *Clerk.*

117 STATE OF ILLINOIS, } *ss:*
County of Cook, }

In the Circuit Court of Cook County, March Term, A. D. 1898.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY. } Petition for Mandamus.

Bill of Exceptions.

Be it remembered that heretofore, to wit, on the 25th day of March, A. D. 1898, being one of the days of the March term of said

court, before his honor Elbridge Hancey, presiding on the common law side thereof, and a jury, this cause came on for trial upon the pleadings heretofore filed herein.

Mr. Jesse B. Barton appearing on behalf of the petitioner.

Messrs. Partridge & Partridge appearing on behalf of the defendant.

And thereupon the petitioner, to maintain the issues on *its* part, introduced the following evidence, to wit:

JOHN B. FERGUS, the petitioner, called as a witness on his own behalf, being first duly sworn, was examined in chief by Mr.
118 Barton and testified as follows:

Q. What is your name?
A. John B. Fergus.
Q. You are the petitioner in this case?
A. Yes, sir.
Q. You reside on the premises described in the petition?
A. Yes, sir; I do.
Q. In what ward of the city are these premises located?
A. In the 25th ward.
Q. Of what does your family consist, residing on these premises?
A. Of a wife and two children.
Q. Any boarder?
A. No, sir.
Q. What is the front width of the house situated on those premises?
A. Forty-eight feet.
Q. How many stories in height?
A. Two.
Q. What water fixtures are in the house connected with the water-works system of the defendant?
A. There are three hand basins, one bath-tub, two closets, one kitchen sink, and one laundry tub—two tubs.
Q. Any hose for lawn-sprinkling?
A. Yes, sir.
Q. How many?
A. One.
Q. Any green-house connected with the premises?
A. No, sir.
Q. Any barn or stables?
A. No, sir.

Cross-examination.

By Mr. PARTRIDGE:

Q. Will you look at the paper I now show you and state whether or not that is your signature?
A. No, sir.
Q. Do you know whose handwriting that is?
A. Yes, sir.

119 Q. Whose handwriting is it?
A. My wife's.

Mr. PARTRIDGE: I ask to have this paper marked for identification Defendant's Exhibit 1.

Q. Did your wife have authority to sign this paper for you?
A. Yes, sir.

Mr. BARTON: I offer in evidence certified copy of an ordinance passed by the city council of the city of Chicago and certified to have been passed on the 18th day of October, 1897.

Mr. PARTRIDGE: We desire to object to this ordinance as incompetent and immaterial.

The COURT: The ordinance regulating the rate?

Mr. BARTON: Yes; your honor.

The COURT: Let it go in.

To which ruling of the court counsel for defendant then and there duly excepted.

Said ordinance was read in evidence and is as follows:

"An ordinance prescribing maximum rates and charges for the supply of water furnished by the Rogers Park Water Company.

Be it ordained by the city council of the city of Chicago.

SECTION 1. That the maximum rates and charges for the supply of water furnished by the Rogers Park Water Company to the inhabitants of that part of the city of Chicago in which said company has been or may be authorized to lay water mains and supply pipes, are hereby established and fixed so as to be uniform and equal in every particular with those charged by the city of Chicago for water supplied from the city water works."

Mr. BARTON: I offer in evidence an ordinance of the city
120 of Chicago published in book form, purporting to be published by authority of the city council of the city of Chicago and noted in such published book as having been passed on the 8th day of April, 1897.

The COURT: You do not raise any question as to the authenticity of the ordinance?

Mr. PARTRIDGE: No, sir.

Mr. BARTON: I desire to read certain parts of it.

Mr. PARTRIDGE: We object to this as incompetent and inadmissible in this case and immaterial.

The COURT: You concede it is an ordinance of the city?

Mr. PARTRIDGE: I don't object to it on the ground of failure to prove the ordinance.

Mr. BARTON: I wish *it* read in evidence a part of section 1981 of this ordinance as follows:

"The minimum water assessment on each and every building fronting on any street, avenue or other public highway, in or through which any public water supply pipe is laid, shall be the amount respectively specified hereinafter as frontage rates, and for special uses of water such rates, in addition, as are hereinafter

named: Provided, however, that when the supply of water to any building or premises is wholly controlled by meter, the said building or premises shall be assessed by meter measurement only, irrespective of the number and character of the fixtures, or the special use for which the water may be used: Provided, further, that in no case shall any building or premises supplied through meter,
121 pay less per annum than the amount prescribed for said building or premises by frontage rates."

Mr. BARTON: And from the same section:

"Frontage rates on buildings having front width of over 44 to 48 feet, two stories in height, $15.50 per annum."

Also section 1981: "All basements and attics containing one or more finished rooms, shall be deemed and estimated as additional stories; modern flats, or family hotels, occupied by more than one independent family, shall be charged for each additional family $3.00 per annum; ordinary dwellings, occupied by more than two families, three dollars for each additional family in excess of two."

Also from the same section as follows: "Private dwelling rates. In addition to frontage rates. A family may consist of any number of persons, not to exceed twelve, including all children, boarders, employees and servants; each person in excess of that number shall be assessed fifty cents per annum. The rate for special water fixtures shall be as follows:

Bathing tubs in private dwelling-houses only, beyond one, each, per annum	$3.00
Water-closets and privy vaults in private dwelling-houses only, beyond one, each, per annum	3.00
Urinals, each per annum	1.00
Wash-hand basins, with faucets, beyond one, each, per annum	1.00
Steam-heating per ton of coal consumed	.05
Green-houses attached to private dwellings each per annum	2.00 to 6.00
Each hose used for sprinkling or washing walks, windows, and like purposes, per annum	3.00

122 Also from the same section as follows:

"Meter measurement rates.—For each one thousand gallons of water used on each independent premises measured and registered by meter, up to and not exceeding 165,000 gallons per month, ten cents per thousand. For each one thousand gallons measured in like manner, in excess of 165,000 per month, eight cents per thousand gallons: Provided, that in no case shall premises supplied through meter pay a less rate than the per annum frontage rate imposed upon like premises not controlled by meter."

Also from section 1985 as follows:

"The water rates or taxes as hereinafter established shall be paid semi-annually in advance at the office of the department of public works. The semi-annual payment shall cover a period from the first day of May to the 31st day of October, and from the first day

of November to the 30th day of April, in each and every year. There are hereby created seven water districts, as follows:

Fifth district.—Embracing that portion of the city comprising the twenty-fifth, twenty-sixth, twenty-seventh, and twenty-eight wards."

Also from section 1986 as follows:

"The semi-annual payment of water rates or taxes assessed in the several districts aforesaid shall be due and payable as follows:

Fifth district: Between the first day of May and the fifteenth day of June, and between the first day of November and the fifteenth day of December, respectively of each and every year."

Also all of section 1987:

"Rebate.—Any person who shall pay the water rates or tax at any time within the period hereinbefore described for the
123 respective districts for the current months, commencing on the first days of May and November, respectively, shall be allowed a rebate of fifteen per cent. on the whole amount assessed or charged to him for said ensuing six months; provided, however, that the rate-payers may pay water rates or taxes in any of the districts aforesaid prior to the time respectively prescribed, and thereby obtain the rebate named. Every person who shall fail to pay the water rates or taxes assessed or charged to him within the time prescribed herein for the said payment shall not be entitled to any rebate, and every person who shall fail to pay his water rate or tax within two months from and after the expiration of the semi-annual period of each year herein prescribed for the payment of the same, shall have the use of the water stopped until the full payment thereof, and all arrearages and charges for shutting off and turning on the water is made."

The COURT: Did you prove a tender of the amount?

Mr. BARTON: It is admitted.

The COURT: Where?

Mr. BARTON: By the pleadings. There is an admission of a tender of $8.72.

Mr. PARTRIDGE: There is no admission that that is the correct amount.

Mr. BARTON: Oh, no; but the amount is admitted, and that tender was made of that amount.

The COURT: Is that the correct amount in accordance with the ordinance?

Mr. BARTON: Yes, sir.

Mr. PARTRIDGE: No; we don't admit that.

The COURT: Well, that is your case.

124 Mr. BARTON: That is my case.

Which was all the evidence here offered on the part of the petitioner.

And thereupon the defendant, to maintain the issues upon its part, introduced the following evidence, to wit:

Mr. PARTRIDGE: We desire first to read in evidence the paper identified by the witness.

The COURT: The application?

Mr. PARTRIDGE: The application. It read as follows:

(DEFENDANT'S EXHIBIT 1.)

"*Application for a Supply of Water.*

ROGERS PARK, ILL., *May* 17, 1897.

To superintendent Rogers Park Water Company:

I, the undersigned, hereby request and contract for a supply of water from the company's main to premises known as lot 7, block 9, 3229 Sheridan road, located on the west side of Sheridan road, between Devon and Albion avenue, in said village, for use and from fixtures as enumerated on the margin hereof. Said water to be supplied subject to the rules and regulations of said company now in force or which may hereafter be enacted or adopted, which rules and regulations are hereby made and declared to be a part of the contract between me and said company for supplying said premises with water.

J. B. FERGUS, *Owner.*

1 tap, 1 St. washers or sill cocks, 3 basins, 1 bath-tub, 2 water-closets, ten rooms, dwelling, 100 feet front lawn; 3 persons or families using same fixtures."

125 The COURT: Is the annexation of Rogers Park also admitted in the pleadings?

Mr. BARTON: Yes, your honor.

The COURT: Was that subsequent to the date of this application or prior?

Mr. PARTRIDGE: Long prior.

The COURT: When was the application made?

Mr. PARTRIDGE: May 17th, 1897. It is not quite a year ago.

The COURT: Very well.

Mr. BARTON: That is the application for water. The demand for water being turned on and the tender of water rates on which we are basing our petition for mandamus was made on the 11th day of December, 1897.

Mr. PARTRIDGE: We desire next to offer in evidence, may it please the court, a certified copy of the ordinance set up in the pleadings and certified by the city clerk the 18th day of March, 1898.

The COURT: What else, now?

Mr. BARTON: I object to the introduction of this as incompetent, on the ground that there is no certificate here and no showing that it was ever published.

Mr. PARTRIDGE: We will have to make proof of publication, your honor. It is customary that the city clerk certify those——

The COURT: It is not in this case.

Mr. PARTRIDGE: It is not, and we will have to prove the publication outside.

The COURT: What is this ordinance?

Mr. PARTRIDGE: The original ordinance of the water company.

The COURT: Can you give the substance of it without having to read it all?

126 Mr. PARTRIDGE: I will only state the substance of it, reading those parts which are necessary. The substance of the ordinance is a grant in consideration of the public benefit to be derived therefrom, quality of the water, certain public rights in the use of water for certain specified purposes, the filing of a bond, and provisions with relation to the extension of the supply, and providing for the payment of hydrant repairs, etc., by the village.

Then section 12:

"The said grantee or assigns shall charges the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer and to charge and collect of him at meter rates, provided that in such cases that the minimum annual rate paid by any one consumer shall be five dollars."

The COURT: Well, what is the difference between that and the city rates fixed by the city ordinance?

Mr. PARTRIDGE: It makes about four dollars difference in six months.

The COURT: Eight dollars a year?

Mr. PARTRIDGE: Somewhere in that neighborhood. I cannot give you the exact difference, but it is in that neighborhood. It is about that, your honor.

The COURT: About eight dollars a year for those sized rooms?

Mr. BARTON: About six dollars on each six months.

Mr. PARTRIDGE: The city rates, may it please the court, are subject to a cash discount for prompt payment.

127 Our rates were not subject to a discount, and the other real difference in the rates consists in the fact that the city furnishes a free closet and a free bath, while we charge for the first the same as for those additional, allowing no cash discount.

The COURT: The last ordinance changes even that.

Mr. BARTON: Yes; that was not in force, however, when this proceeding was commenced, nor when the ordinance that I offered in evidence was passed.

The COURT: The whole ordinance is in.

Said ordinance was marked "Defendant's Exhibit 2," and is as follows:

An ordinance to provide for supply of water to the village of Rogers Park, Ill., and its inhabitants, contracting with H. E. Keeler, his successors and assigns, for a supply of water for public use, and giving the said village of Rogers Park, Ill., an option to purchase the said works.

Be it ordained by the board of trustees of the village of Rogers Park, Cook county, Illinois.

SECTION 1. That in consideration of the public benefit to be derived therefrom, the village of Rogers Park, Ill., hereby grants

the exclusive right and privilege for the period of thirty years from the time that this ordinance takes effect unto H. E. Keeler, his successors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and the said village hereby grants the exclusive right of using the streets, alleys, public squares and all other public places within the corporate limits of said village as they now exist, or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for furnishing, storing and conducting an adequate supply of good wholesome, clear water to the said village and to its inhabitants for public and private use, and for making repairs and extensions to the said system from time to time during the period in which this ordinance shall be in force.

The said grantee, his successors and assigns, shall exercise care and diligence in the use of said streets, alleys public squares and other public places, and shall cause no unnecessary obstruction of, or interruption of the public travel over or upon same or any injury to, or interference with any pipes, mains or sewers which may now be lawfully located beneath the surface thereof.

The said grantee, his successors and assigns, shall take due precaution to provide against danger to life and limb by reason of the exercise of their rights and privileges, and shall cause all excavations and obstructions to be properly lighted and guarded at night, and after the completion of the purpose for which said streets, alleys, public squares and other public places may be used, they shall be restored to their former condition as near as may be without unnecessary delay.

The said grantee, his successors and assigns, hereby agree to hold the said village harmless from liability which may result to it by reason of any violation of this section.

SECTION 2. The general plan of the system of said water works shall be as follows: same to be subject to approval of the village board of trustees.

Mains.—These shall be ample in size to supply water to meet the demands for water for fire and domestic purposes and shall vary in diameter from 12 inches to 4 inches.

They will be of the best quality of cast-iron pipe and will be tested at the foundry to a pressure of three hundred (300) pounds to the square inch, and shall be tested after the works are completed to a pressure of 125 pounds per square inch, as shown by a gauge attached to a hydrant near the Chicago & Northwestern Railroad depot, and remain tight under said pressure, provided that no single length of four-inch main longer than eight hundred (800) feet shall be constructed and laid.

Hydrants.—These shall be of the best kind and quality manufactured, shall be provided with two hose nozzles and shall be frost-proof. They shall be strong enough to stand the same tests as those provided for the mains. The grantee, or assigns, shall

furnish at their expense sixty hydrants with their branch castings and connections, and located in such places upon said first five miles of mains as the trustees may direct. Said location to be made within thirty days (30) after the date of the acceptance of this ordinance those furnished and located at the time the mains are laid shall be erected and connected with the mains by the grantee, his successors and assigns, and if the village shall at any time in the future elect to place intermediate hydrants on the original pipe system, such hydrants shall be placed by the grantee at the expense of the village, and the town shall pay no rent therefor.

130 Those furnished and located thereafter shall be erected and connected with the mains by the grantee or assigns, but the cost thereof shall be paid by the village of Rogers Park. Said hydrants shall be under the sole charge, for said village, of the chief of the fire department, and all repairs and damages except those caused by ordinary wear and tear shall be repaired by said grantee or assigns, and the actual cost of such repairs shall be paid by said village.

Gates and valves.—These shall be of the best quality and shall stand successfully the test prescribed for the mains.

Pumps.—The pumping machinery used shall be one compound and one high-pressure duplex pumping engine, and shall at the outset have a capacity sufficient for fulfilling the terms and conditions of the ordinance, same to be of not less than 1,500,000 gallons capacity in 24 hours, and shall have boilers of capacity to furnish sufficient steam for them when running at full speed. It and its appurtenances shall be of the best make, strong and durable. It will be kept in good working order at all times, saving unavoidable accidents, and its total capacity shall be increased from time to time as the needs of the village may require. It will be so arranged that the connection with the stand-pipe may be closed instantly and that it will pump directly into the mains.

Stand-pipe.—This shall be built of steel, and shall be not less than 12 feet in diameter. Its top shall be not less than 100 feet above the elevation of the ground in front of the C. & N. W. R. R. depot in said village of Rogers Park. It shall at all times be kept as nearly full as is practical.

131 SECTION 3. In consideration of public benefits and the protection to property resulting from the construction of the said system of water works, the said village hereby agrees to pay an annual rental for fire protection to said grantee, his successors and assigns for not less than five miles of mains within the corporate limits of said village, for the aforesaid period of thirty years, at the annual rate of five hundred and seventy-five dollars for each mile of mains, to be payable semi annually on the first day of July and January in each year. Also the village of Rogers Park agrees to pay all municipal or village taxes which may be assessed against the plant of said grantee, or assigns, for the first ten years the water works are operated. The rental for fire protection of mains in excess of said five miles, as hereinafter provided, at the request of the

said village shall be at the annual rate of four hundred dollars for each mile of mains, payable as aforesaid during the unexpired period of the said original term of thirty years. The rental shall begin at such time as the said grantee or assigns shall begin to maintain continuously a pressure of 40 pounds per square inch. Water shall be used from the hydrants for the extinguishment of fires, and for flushing sewers only. In flushing sewers automatic devices may be used and so regulated that they shall not discharge more than 60 gallons each per day, and, that there shall not be more than ten for each mile of mains, and that the same shall always be kept in proper working condition by the village and all waste of water prevented.

The village shall also have the right to use water from all the public hydrants during the full term and continuance of this franchise and contract for the purpose of flushing public sew-
132 ers and gutters whenever the said village shall deem it necessary for sanitary purposes, upon giving notice to said grantee or assigns at the pumping station. Said flushing to be done by the village through hose and fire nozzle only, but there shall not be more than two hydrants open at one time for such purpose, and no one hydrant shall be opened oftener than twice a week and not longer than twenty minutes at one time for such a purpose, and there shall be no flushing in the time of fire. The village shall use the water as provided in all of above cases in a reasonable manner and without unnecessary waste. Said grantee, his successors and assigns hereby agrees to furnish, without additional charge, in consideration of franchise and rentals, hereby agreed to be paid by said village, water sufficient to supply two drinking fountains (public) for the use of man and beast. The supply pipe of each shall not be larger than one-half inch in diameter, to be constructed at such places in said village as the village board may direct. Also one jet fountain of not to exceed ¼-inch orifice in each of the public parks of said village; also water sufficient to supply each of the public schools in said village, and also at the public offices of said village, and for the use of the fire department, at the engine-house of said village. The said village agrees to furnish said fountains, faucets, etc., and furnish all material and pay the expense of connecting same with the mains of grantee or assigns, and to use every precaution to prevent all waste of water.

133 The said grantee, his successors or assigns, in consideration of the rental herein agreed to be paid, and in consideration of rights and priveleges granted expressly agrees on its part to furnish to said village of Rogers Park, and to the residents thereof, an adequate supply of good, wholesome and clear water fit for culinary and drinking purposes; said water to be taken from Lake Michigan at such a point near the north boundary line of said village as will best insure its freedom from sewerage contamination and it shall be filtered by the most modern and by an acceptable process before being delivered into the mains for supplying said village, and if said grantee, his successors and assigns

shall at any time fail to furnish a supply of water to said village and the residents thereof, of the quality and quantity provided for in this ordinance, then all rentals to be paid by said village to said grantee or assigns, shall cease until said grantee or assigns shall provide and supply water of the degree of purity and in the quantity provided for in this ordinance, and also provided that should said grantee or assigns fail to supply water of the quality and quantity and in the manner aforesaid to said village and its inhabitants for a greater length of time than one year at any time and after having been given due notification by said village that the authorities of said village consider the supply of water, either in quality or quantity, not in compliance with this ordinance than the said grantee or assigns shall forfeit and surrender to said village its said franchise and all other rights and privileges granted under this ordinance, and the contract herein entered into shall be null and void. Said grantee or assigns further agrees to furnish such steam as may be needed for running one or more air-compressors
134 to be furnished by said village and located in the pumping station of said grantee or assigns; the total power used by said air-compressors shall at the outset not exceed 10-horse power. All power in excess of that above provided, which said village may need for running air-compressors, shall be furnished by said grantee or assigns at a cost of seventy-five dollars per horse-power per annum.

SECTION 5. Upon the completion of the construction of the said system of water works the said grantee or assigns shall notify the board of trustees of said village to that effect, and thereupon submit the works to such a test as will show the capacity of the works to be sufficient to throw water through 100 feet of 2½ inch hose and one-inch nozzle from each of six (6) different hydrants not located on the same main, to a height of 90 feet above the level of the ground at the C. & N. W. R. R. depot when the air is still. The performance of this test shall be a fulfillment by the grantee or assigns of the terms and conditions of this ordinance so far as relates to strength and capacity. Said grantee or assigns shall so maintain and enlarge said water works that they will at all times be capable of performing such tests, and said village board shall have the right to order a repetition of said tests annually by giving said grantee or assigns a written notice of thirty days, and a failure on the part of said grantee or assigns to make such test shall cause a suspension of said rental of mains until said grantee or assigns successfully perform said test.

SECTION 6. Within sixty days after the day that this ordinance takes effect, the said grantee or assigns shall file a written ac-
135 ceptance thereof in the office of the village clerk, and at least five thousand dollars work and material on said works shall be done and furnished before December 31st, 1888. The construction of said water works shall be commenced within sixty days after this ordinance takes effect, and said works shall be completed within one year after the commencement of the construction thereof, provided, however, that the term during which the said grantee or assigns are

delayed by floods, act of God, or the public enemy, legal proceedings for the maintenance or defense of their rights or in the acquisition of property, water rights, right of way, mutinous interference or by reason of any other cause whatever beyond its control, shall form no part of the time limited in this ordinance for the performance of any act required by the terms hereof to be done by them.

SECTION 7. The said village board of trustees shall from time to time pass and enact ordinances, under suitable penalties, providing for the protection of said works from damage, fraud or imposition.

SECTION 8. At the expiration of ten years after the completion of said works, and at the expiration of each succeeding period of five years thereafter, the said village shall have the right and privelege to purchase the said system of water works, provided they notify the said grantee or assigns of their intention so to do at least six months before the expiration of said period or periods of years. The value of said system shall be ascertained as follows: The said grantee or assigns and the said village shall each appoint one person, and the two appointees shall choose a third, and the
136 three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of the said system of water works. In case the two experts chosen disagree upon the selection of the third he shall be appointed by a judge of the circuit court of some adjoining circuit. None of the board shall be residents of Rogers Park, Ill. The said board in fixing the value of said works shall take into consideration the value of the franchise, the value of water rights and right of way, the revenue from the works and all other facts and considerations legitimately connected with the said works. The said village shall within sixty days after the said board has rendered its decision pay the amount awarded in cash, and upon such payments the said grantee or assigns shall transfer to the said village all their said rights and privileges and property included in said appraisement.

SECTION 9. The said grantee or assigns shall make extensions of mains whenever called upon to do so by the village board of the said village, provided however that said extensions shall be not less than 500 feet in length, and further provided that there shall be one water consumer for each 100 feet along the line of such extension who shall agree to take water at the established rates for a period of at least two years, but as a condition of making such extensions the village agrees to pay for public fire service upon such extensions at the rate of four hundred dollars per annum for each mile of such extension for the unexpired term of this franchise and contract.

SECTION 10. After the said works are put in operation, if at any time, the said grantee or assigns are unable to provide a fire pressure
137 of 60 pounds on the distributing mains at the said C. & N. W. R. R. depot for a period of two weeks in succession, then the rental for the use and employment of the mains for the purpose aforesaid shall cease until such standard of pressure shall be attained.

Nothing herein contained shall be so construed as to prevent the said grantee, or assigns from temporarily shutting off the water from its said system, or any portion thereof, for the purpose of making repairs or extensions to the same, and no liability shall attach to the said grantee or assigns for the suspension of the supply of water, provided the repairs or extensions are made and the water turned on again without unnecessary delay.

SECTION 11. The said grantee or assigns shall have the right to make, alter, amend and enforce rules for governing the connections with their mains, and the use of the water and for preventing the waste of water.

SECTION 12. The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer and to charge and collect of him at meter rates, provided that in such case that the minimum annual rate paid by any one consumer shall be five dollars.

138 *Tariff of Water Rates.*

Barber shops, 1 chair	$5.00
Barber shops, each additional chair	3.00
Bath-house, public, each tub	7 to 15.00
Bath-house, private, each tub	3.00
Bath-house, boarding-house, each tub	5.00
Blacksmith shops, one fire	4.00
Blacksmith shops, each additional fire	3.00
Boarding and lodging houses and furnished rooms, per room	1.00
Boarding schools, per room	1.00
Butcher shops, engines and boilers extra	7 to 15.00
Dental offices	6 to 10.00
Drug stores	10 to 25.00
Dwelling-house, 5 rooms or less for family	6.00
Each additional room	1.00
Eating-houses	10 to 25.00
Fountains flowing not exceeding 3 hours per day during the season from 1st of April to 1st of November, one-sixteenth $\frac{1}{16}$ inch orifice	8.00
Fountains, one ($\frac{1}{2}$) eight-inch jet for the season as above	10.00
Hose for sprinkling streets, including washing and sprinkling sidewalks, the outside of buildings, per lineal front foot, business houses, per season of 6 months	15.00
Same as foregoing, private houses, per front foot	10.00
Hose for sprinkling lawns of 66 feet frontage 5c. each extra front foot	5.00
Hotels, per room	1.00
139 Livery, sale and feed stables, per single stall including washing carriages	3.50
Private stables, 1 horse including carriage-washing	3.00
Private stables, each additional animal	1.50

Stores not specified otherwise 22 feet, or less, first floor	7.00
Stores, each additional floor	3.50
Stores, each additional front foot	.50
Urinals in hotels, boarding-houses, saloons	6.00
Urinals in private houses	3.00
Urinals in blocks, mfg. establishments	4.00
Urinals in stores banks and offices	3.00

Urinals with constant flow, special rates.

Wash-basins, stationary, first basin in private family free, all others each	3.00
Water-closets, private, per bowl	3.00
Water-closets, public, per bowl	5.00

Yard hydrants, at dwelling or boarding-house rates.

All persons not satisfied with the schedule rates can have the privelege of putting in a water meter at their own expense.

Meter Rates.

Less than 300 gals. per day, per 100 gals	.050
300-400 gals. per day, per 100 gals	.045
400–1,000 " " " " " "	.040
1,000–3,000 " " " " " "	.035
3,000–5,000 " " " " " "	.030
5,000 gals. and upwards per 100 gals	.025
10,000 gals. and upwards, per 100 gals	.020

140 Rates for all other purposes that may be applied for not named in the foregoing schedule of maximum rates will be fixed by estimation or meter, at the option of the grantee or assigns.

SECTION 13. A sufficient tax shall be levied and collected annually upon all taxable property in the village subject by law to such taxation to meet the payments under this ordinance as they may respectively mature, during the existence of any contract for public fire service, which tax shall be irrepealable from and after the passage of this ordinance, and in case the village shall be authorized to levy a special tax for such purposes, such tax shall be annually levied and the proceeds thereof shall be kept as a separate fund to be known as a fire-hydrant fund, and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed except that any excess of said tax in any one year over the amount necessary to pay rentals for such year may be used for any purpose that the village of Rogers Park may direct.

SECTION 14. Within sixty days after the passage of this ordinance said H. E. Keeler, his successors or assigns, shall file with the village an acceptance of the same, which acceptance duly acknowledged before some officer authorized to administer oaths shall

have the effect of a contract between the village and said H. E. Keeler, his successors or assigns.

Passed Nov. 12th, A. D. 1888.

JOHN L. HEALY,
Village Clerk.

Approved Nov. 12th, A. D. 1888.

HENRY P. DALY,
President Board of Trustees.

141 STATE OF ILLINOIS, } ss:
County of Cook, }

I, Wm. Loeffler, city clerk of the city of Chicago, do hereby certify that the above and foregoing is a true and correct copy of an ordinance providing for the supply of water for the village of Rogers Park passed by the board of trustees of said village (now a part of the city of Chicago) on the 12th day of November, A. D. 1888, and approved by the then president of the board of trustees of said village on the 12th day of November, A. D. 1888, as recorded in the book of ordinances of said village, page 266, and that I am the lawful custodian of the same.

Witness my hand and the corporate seal of the city of Chicago this 18th day of March, A. D. 1898.

WM. LOEFFLER,
City Clerk.

[SEAL.]

C. H. CEPERLY, a witness called on behalf of the defendant, being first duly sworn, was examined in chief by Mr. Partridge, and testified as follows:

Q. What is your present employment?
A. I am in the county clerk's office at present.
Q. Where do you live?
A. Rogers Park.
Q. How long have you lived there?
A. 28 years.
Q. In what capacity were you connected with the government of the village of Rogers Park during the year 1888?
142 A. I was one of the village trustees at the time.
Q. Do you remember any time during the fall of the year when the Rogers Park water ordinance was up in the board?
A. Yes, sir.
Q. Do you remember whether there was a paper published in the village at that time, in November, 1888, and afterwards—is there a newspaper published there?
A. Yes, sir.
Q. What was the name of that paper?
A. The Herald.
Q. What is the full name of it?
A. The Rogers Park Herald.
Q. I call your attention to the date of the paper which you hold in your hand. What is its date?

A. November 24th, 1888.

Q. Now, turn the paper over and look at the back; do you remember whether the ordinance was published in that paper which you hold in your hand? Do you remember whether the publication was made?

Mr. Barton: The paper will show.

A. It was published in the Rogers Park Herald, I remember.

Mr. Partridge: Is that a copy of the publication that you have there?

A. It appears to be; yes, sir.

Q. Well, is it? Is that the publication of the ordinance?

A. Well, I have not examined the ordinance. I know the ordinance was printed in the Rogers Park paper, though.

Q. Well, look at it so as to be able to answer. Do you know whether as a matter of fact that was the official publication of the ordinance? Do you know whether that was ordered by the village board?

A. I don't remember whether it was ordered or not.

Mr. Barton: I am perfectly willing to admit that that is a fact. Didn't the board make some provision that all publication of village matters should be in that paper?

A. I think they did. I would not be positive, but I think
143 they did. The records will show that. I think they did.

Mr. Partridge: Was that the only paper published in the village of Rogers Park at that time?

A. It was; yes, sir.

The Court: Well, what next?

Mr. Partridge: If that is the only paper published there, are you willing to admit that was the publication of the ordinance?

Mr. Barton: If you will give me your word for it that it was published by order of the village board, either directly or indirectly, by making that the medium of publication I will admit it.

Mr. Partridge: I am told by the man who was village clerk at the time that that was the publication.

Mr. Barton: All right, then, I will admit it.

Mr. Partridge: Well, if it is admitted that is the official publication I will not put him on the stand.

The Court: He has admitted it.

Mr. Barton: Yes; I will admit that the ordinance was duly published.

The Court: He says he will admit it. What next?

Mr. Partridge: I next offer in evidence a paper, dated the 31st day of January, 1889, showing the assignment of the benefits of the ordinance which has been introduced in evidence by H. E. Keeler, the grantee in that ordinance, to the Rogers Park Water Company. That is the original paper, the articles of agreement — the 31st of January, which paper is marked "Defendant's Exhibit 3."

The Court: It is conceded that Keeler did assign all his interest to the Rogers Park Water Company?

Mr. Partridge: It is denied in the pleadings.

144 Mr. BARTON: He puts this in evidence and said he was going to read it. It may go in without objection.

Mr. PARTRIDGE: This is an agreement assigning by Keeler to the water company the benefit of the ordinance which has been introduced in evidence

Said paper is as follows:

(DEFENDANT'S EXHIBIT 3.)

"Articles of agreement, made and entered into this 31st day of January, A. D. 1889, by and between Hervey E. Keeler, of Chicago, in the county of Cook, and the State of Illinois, party of the first part, and the Rogers Park Water Company, a corporation organized and doing business under the laws of the State of Illinois, and having its principal office in the city of Chicago aforesaid, party of the second part, witnesseth: That whereas, the village of Rogers Park, of Cook county aforesaid, by an ordinance entitled 'An ordinance to provide for a supply of water to the village of Rogers Park, Ill., and its inhabitants, contracting with H. E. Keeler, his successors and assigns, for a supply of water for public use, and giving the said village of Rogers Park, Ill., an option to purchase the said works,' duly passed by the board of trustees of said village on the 12th day of November, A. D. 1888, granted to said party of the first part, his successors and assigns, the exclusive right and privilege for the period of thirty (30) years from the time

145 said ordinance took effect, or erecting, maintaining and operating a system of water works in said village and giving said village an option to purchase said works in accordance with the terms and provisions of said ordinance, and which said ordinance was thereafter duly accepted by said party of the first part; and

Whereas, said party of the second part desires to acquire the privileges, rights, and franchises belonging to or acquired by said party of the first part, and to which he may or might hereafter at any time become entitled under or by virtue of said ordinance; and the said party of the first part desires to sell, assign, transfer, and set over unto said party of the second part all benefit, right, title, privilege, and advantage belonging or hereafter to accrue to him, in any way or manner whatsoever, by virtue of the said ordinance:

It is, therefore, mutually agreed by the parties hereto as follows:

1. Said party of the first part does hereby sell, assign, transfer and set over unto said party of the second part, all right, title, benefit, privilege and advantage whatsoever, which he has, or which he may or might at any time hereafter become entitled — in any way or manner whatsoever, under and by virtue of the said ordinance.

2. Said party of the first part further agrees to convey all necessary real estate upon which to erect the necessary buildings and works in said ordinance provided for, or which may be necessary for the successful operation of the system of water works therein

mentioned; and further, that he will build, erect and put in
146 operation all necessary buildings, five (5) miles of mains, hydrants, gates and valves, pumps, stand-pipe and other machinery to fulfill the requirements of the said ordinance to the satisfaction and acceptance of said board of trustees.

3. In consideration of the promises and agreements hereinbefore contained, of said party of the first part, said party of the second part hereby covenants and agrees to issue to said party of the first part, or to such person or persons as he shall request in writing, the full number of nineteen hundred and seventy (1,970) full-paid shares of the capital stock of said company, of the face or par value of forty-nine thousand two hundred and fifty ($49,250) dollars, to have and to hold to him, his heirs and assigns, to and for his and their own use and benefit; and, further, to issue and deliver to him or to such person or persons as he may request in writing, forty (40) bonds, secured by first mortgage upon all the property rights and franchises of said company, of the par or face value of forty thousand ($40,000.00) dollars, which shall be received and are hereby accepted by said party of the first part in full payment to him for the full performance of all the agreements hereinbefore contained on his part to be performed.

In witness whereof these presents have been signed and sealed by said party of the first part, and the party of the second part has caused the same to be signed by its president and countersigned by its secretary and its corporate seal to be affixed thereto on the day and the year first hereinabove written.

147 HENRY E. KEELER. [SEAL.]
[CORPORATE SEAL.] ROGERS PARK WATER CO.
H. E. KEELER, *President.* [SEAL.]
FRANK D. KEELER, *Sec'y.*

We, the undersigned, subscribers and holders of the full amount of the capital stock of the Rogers Park Water Company, above mentioned, do hereby ratify, confirm, and accept the above and foregoing contract between said company and Hervey E. Keeler."

Mr. PARTRIDGE: I have here a large number of agreements and papers, showing that the city has recognized the Rogers Park Water Company, the present defendant, as the owner of this plant and ordinance, has ordered them to do a great many things, and has paid them a great deal of money, and that sort of thing.

The COURT: Is that controverted in the pleadings?

Mr. BARTON: Yes, your honor; it is not admitted in any way.

Mr. PARTRIDGE: All I desire to show, your honor, is an actual user of this ordinance, and that it has been continuously used and exercised, and that the present defendant has been recognized during all this time as the owner and operator of these water works.

Mr. BARTON: I admit an actual user since the completion of the water works and continuous recognition of the company by the vil-

lage and city authorities as having the right to operate the system of water works.

The COURT: Then that is not controverted.

Mr. BARTON: Not that general proposition.

The COURT: If you allege, and he does not deny, then it is admitted.

Mr. PARTRIDGE: I have here the original acceptance of the
148 works as provided in the ordinance, which I desire to introduce in evidence, to show that when the works were constructed by the company, which did construct them, that they were accepted by the village as complying with the ordinance, which is marked "Defendant's Exhibit 4."

The COURT: You have got past that, haven't you?

Mr. PARTRIDGE: I will put this in. It is a very short paper.

Said paper is as follows:

(DEFENDANT'S EXHIBIT 4.)

ROGERS PARK, *Aug. 21st*, 1889.

H. E. Keeler, Esq., pres. Rogers Park Water Company.

DEAR SIR: At a special meeting duly called of the board of trustees of the village of Rogers Park, held Aug. 19th, the following resolution was unanimously carried:

Whereas, in accordance with notice received from the Rogers Park Water Co., dated Aug. 10th, 1889, a public test was made Aug. 17, 1889, and the power and capacity of the completed water works were shown to be ample to comply with the requirements of the water-works ordinance and section 5 of said ordinance:

Therefore resolved, That the village of Rogers Park, through its board of trustees, hereby accept said system of water works and pipe distribution as ordered by said board of trustees.

Yours respectfully,

A. W. CRAIG,
Acting Village Clerk.

A true copy.

149 STATE OF ILLINOIS, }
Cook County, Village of Rogers Park. }

[SEAL.]

I hereby certify that the within and foregoing resolution was unanimously passed and approved by the president and board of trustees of the village of Rogers Park on August 19th, 1889.

Witness my hand and the seal of the village of Rogers Park this 26th day of August, 1889.

A. W. CRAIG,
Acting Village Clerk.

Mr. PARTRIDGE: That is our case.

The defendant here rested. And thereupon the petitioner, to further maintain the issues upon his part, in rebuttal, introduced the following testimony, to wit:

WILLIAM WYATT MCGAFFEY, called as a witness on behalf of the petitioner, being first duly sworn, was examined in chief by Mr. Barton, and testified as follows:

Q. What is your name?
A. William Wyatt McGaffey.
Q. What is your occupation?
A. At present I am a clerk in the city clerk's office.
Q. How long have you been such clerk?
A. Very nearly five years.
Q. Have you with you the journal of the proceedings of the president and board of trustees of the village of Rogers Park?

150 Mr. PARTRIDGE: To that question I object. In the first place, he is not shown to be a deputy clerk. It is the city clerk, I suppose, who would have to be subpœnaed or some authorized deputy.

The COURT: What are you doing in the city clerk's office?
A. Well, I am one of the clerks there.
Q. You are a deputy clerk?
A. I have been deputized for this purpose. I was designated to bring these books here.

Mr. PARTRIDGE: To produce the books, certainly, but that does not quite reach the objection.
The COURT: The only question now is, have you in your possession those books?
Mr. PARTRIDGE: This is the identification of the books and I object to the question.
The COURT: Why?
Mr. PARTRIDGE: On the ground that it is not shown that he is a deputy clerk or that he has any means of knowledge——
The COURT (addressing the witness): Go on.
To which ruling of the court counsel for defendant then and there duly excepted.
Mr. BARTON: Did you answer the question?
The WITNESS: I answered that I had Journal B before me here of the village of Rogers Park board of trustees.

Q. Where did you bring that book—where did you get that book from?
A. From the vaults of the city clerk's office.
Q. Who directed you to bring it here?
A. I was directed by the deputy clerk, Mr. Strain.
151 The COURT: The chief deputy?
The WITNESS: Yes, sir; the only deputy.
Mr. BARTON: There is only one deputy clerk, is there not?
A. Yes, sir.
Q. He is the custodian of that book—who is the custodian?
A. The city clerk.
Q. Of the city of Chicago?
A. Of the city of Chicago.

Q. Now, will you turn to the meeting of the president and board of trustees of the village of Rogers Park of November 12th, 1888?
A. And November 12th, 1888.

Mr. PARTRIDGE: I object.
Mr. BARTON: Will you read to the court and jury the proceedings of that meeting?
Mr. PARTRIDGE: I object.
The COURT: He has no right to read that until it is offered in evidence.
Mr. BARTON: I offer the proceedings of that meeting in evidence, and ask the witness to read them.
Mr. PARTRIDGE: And I object on the ground of lack of identification of the book and of any knowledge shown by the witness as to what the book is and as to the lack of official capacity on his part to testify as to the book.
The COURT (addressing the witness): Go along.
To which ruling of the court counsel for defendant then and there duly excepted.

Mr. BARTON: Read that now, please.
A. "Regular meeting, November 12th, 1888. Present: Messrs. Daly, Phelps, Sturgis, Roberts, Phillip, & Ceperly.
"Minutes of the three previous meetings were read and approved.
152 "Mr. Phelps moved that the bill of Rogers Park Water Co. be referred back to committee, with request for them to produce contract under which the bill was made. Carried.
"Mr. Phillip, from committee on side and cross walks, recommended that sidewalks on Grand Ave. be run straight south from Touhy to Greenleaf Ave., and jog, if any occur, be remedied by moving sidewalk on south end. Carried.
"Mr. Phelps moved that warrant be drawn for the following bills: L. H. Jennings, on ac. salary, 50.00; J. L. Healy, ac. salary, 20.
"Ayes—Phelps, Sturgis, Roberts, Phillip, Ceperly.
"Nays—None.
"C. G. Kingwell, p't'g, 2.25; Miss C. P. Holmes, typewriting, 5.00."
The COURT: What do you want this for?
Mr. BARTON: To prove that the ordinance offered in evidence was not passed on November 12th as certified.
The COURT: Which ordinance?
Mr. BARTON: The ordinance which was offered in evidence by Mr. Partridge, claiming to be an ordinance passed November 12th, 1888, granting certain rights to H. E. Keeler.
Mr. PARTRIDGE: There are two books kept by the village, or should be—an ordinance book and a record of the meetings. This ordinance is certified as a true and correct copy from the ordinance book of Rogers Park, and is made by law evidence when certified.
153 The COURT (addressing witness): Go on.
A. (Reading:) "Mr. Phelps moved that an ordinance be

ordered drawn for sidewalk on west side of Ridge Ave. from north line of village to south side of Indian boundary. Carried." "Here insert amendment."

"Mr. Ceperly moved that above ordinance include sidewalk on east side of Chicago Ave. from Indian boundary to Touhy Ave. Carried.

"Mr. Phelps moved that that portion of petition covering sidewalk south from Indian boundary, on Ridge road, be referred back to petitioners. Carried.

"Bids from J. M. Kean, at 32c. per foot, and Webster Hoyt, at 35c. per foot, for building sidewalk under ordinances now incomplete, were received. Mr. Phelps moved that the contract be awarded to J. M. Kean at 32c. per foot, payment to be made when collected against property with tax levy of 1889. Carried.

"Mr. Phelps moved that the clerk be instructed to furnish list of unbuilt sidewalk and notify parties interested. Carried.

"On motion of Mr. Phelps, adjourned.

"Amendment.—The ordinance granting franchises for
Void. water supply to H. E. Keeler was read by the clerk and amendments noted.

"Mr. Phelps moved that ordinance be passed as read.

"Ayes—Phelps, Sturgis, Roberts, Phillip.

"Nays—Ceperly."

Mr. PARTRIDGE: If Mr. McGaffey will kindly refer to the part where it says, "Here insert amendment," at the foot, where
154 it is marked "amendment," I want him to read that to the court; not to the jury, but just read to the court what the amendment is that is referred to.

The WITNESS: After the adjournment, on motion of Mr. Phelps, then comes this amendment: "Amendment.—The ordinance granting the franchise of water supply to H. E. Keeler was
Void. read by the clerk and amendments noted.

Mr. Phelps moved that the ordinance be passed as read.

Ayes—Phelps, Sturgis, Roberts, Phillip.

Nays—Ceperly."

The COURT: Who scratched that out and marked on the margin "Void"?

A. I cannot say that. I heard a statement made——

Mr. PARTRIDGE: I object to the statement that you may have heard.

The COURT: You don't know except what somebody told you, is that it?

A. I know that the gentleman said that he scratched it out.

The COURT: You have not got in there, though, the part "Here insert amendment."

Mr. PARTRIDGE: Yes, your honor, he read "Here insert amendment;" that has been read.

The COURT: Very well; the balance of it there does not concern this in any way. It is conceded that there is not anything in the

balance of it down to the part on page 258 of this record, after the words "On motion of Mr. Phelps, adjourned."

155 Mr. BARTON: I don't know that there is any use of his reading it. It is for the court, and not the jury, and the court has read it now.

The COURT: Yes.

Mr. PARTRIDGE: I desire to read—well, if you don't care for anything further, that is different.

Mr. BARTON: It is not for the jury.

Mr. PARTRIDGE: That depends; it may be.

The COURT: This book cannot go into the record, and the only way you can get it in is to have it read. Where did you stop reading?

A. I stopped right there.

Mr. BARTON: If it is not very much I would prefer so that it will show, "From north line of village to south side of Indian boundary. Carried."

The WITNESS (reading): "Here insert amendment," and the mark goes up to the head of that paragraph on this margin.

The COURT: Goes up to the line just ahead of the word "Phelps."

A. "Mr. C-perly moved that above ordinance include sidewalk on east side of Chicago avenue from Indian boundary to Tuohy Ave. Carried."

The COURT: On the margin of that page is written the word "Void," and twelve pencil marks—straight pencil marks—six each way, over the face of that part of the record, are drawn by somebody.

Mr. PARTRIDGE: I desire the court to state in the reporter that the word "Void" is also written in pencil.

The COURT: Yes; the word "Void" is written in pencil.

Mr. BARTON: When did you first see that book, Mr. McGaffey?

156 A. Well, I have seen the book ever since I have been in his office; known of its existence; but for this particular part, about two or three weeks ago——

Q. How long have you been in the office?

A. Ever since the annexation of Rogers Park.

Q. Who received the books and papers of Rogers Park after the annexation?

A. The city clerk or his representative.

Q. Who was his representative?

A. I think there is a memorandum in the vault saying that a Mr. Cook is.

Q. Were you present?

A. No, sir; I was not.

Q. How long after the annexation did you know of this book? Were you in the office at the time of the annexation?

A. I think not. I think the annexation occurred in 1892. I was in the office when Rogers Park was assigned to the ward that it now is in.

Q. And when did you first go in the office?

A. In 1893—May 1st, 1893.

Q. Do you know who made the marks across that part of the record which is marked "Amendment," and who wrote the word "Void"?

Mr. PARTRIDGE: Well, if he knows.

The COURT: Yes, of your own knowledge do you know?

A. I can only state what was told me by the gentleman who said that he made the marks.

Mr. PARTRIDGE: Of course, your honor, I will object to any statement of the kind.

157 The WITNESS: I did not see him make the marks.

Mr. BARTON: Have you any information received from the person who had the custody—the legal custody—of the record, as an official of the village of Rogers Park?

Mr. PARTRIDGE: I object to that question.

The COURT: Well, that question is competent, but the next one is the material one. All you can do is to say either yes or no.

A. Well, I know. Can I say who informed me?

Q. You are asked if you have knowledge, and so forth.

A. Yes; I have.

Mr. BARTON: Communicated to you as an employee of the city of Chicago?

Mr. PARTRIDGE: I object to that question, your honor.

Mr. BARTON: What was your occupation when that was communicated to you?

A. I was in the city clerk's office, an employee.

Q. I will ask you what that communication was.

Mr. PARTRIDGE: I object.

The COURT: And the objection is sustained.

To which ruling of the court counsel for petitioner then and there duly excepted.

Mr. BARTON: When did you first see those pencil marks and the word "Void" written in pencil?

A. I think after the subpœna was served. The subpœna was handed to me to produce the books, and I looked up the matter, got out the book.

Q. Did you ever see the part marked "Amendment" without those erasures or erasing marks or the word "Void"?

A. I don't remember that I ever did.

158 Q. Do you know whether or not that was done in the office of the city clerk?

A. I don't think that it was.

Mr. PARTRIDGE: I object to that answer, your honor.

Mr. BARTON: If he knows of his own knowledge.

The COURT: If you know, witness, you can tell; if you don't know, why, say so.

A. I don't know.

Mr. BARTON: That is all.

Mr. PARTRIDGE: That is all.

The COURT: That closes the evidence on both sides?

Mr. PARTRIDGE: I believe so.

The COURT: Well, do you want to talk on it?

Mr. PARTRIDGE: I have some instructions, your honor, that I want to submit to the court. They contain my argument. There is one thing that will have to be done. It will be necessary in some way to get before the jury the rates assigned by the ordinance are higher than the amount tendered by the petitioner.

The COURT: Well, you can agree on that. You have practically stated that it was about four or five dollars every six months.

Mr. BARTON: Have you figured up this tender of ours on the fixtures?

Mr. PARTRIDGE: I think that it was about $13. I knew the amount was materially more.

The COURT: It is conceded here that the amount tendered is the amount fixed by the city ordinance.

Mr. PARTRIDGE: Well, it is denied in the pleadings, and I am not prepared to admit it.

Mr. BARTON: Well, your honor, I have figured it up, and unless the case is closed I will be sworn and testify that I have figured up the amount.

159

The COURT: Well, swear Mr. Barton, then.

JESSE B. BARTON, being first duly sworn on behalf of the petitioner, testified as follows:

I have estimated the rates charged under the city ordinance offered in evidence, and allowing the discount I find that it is, the amount for six months, the six months beginning the first of November——

The COURT: That is, the amount tendered by the petitioner was the amount fixed by the city ordinance?

A. For the six months.

Q. Yes.

A. The tender, if the court please, was made on the 11th of December, and a month from the 3rd had already elapsed up to the time—of course, he would not be obliged to pay——

Q. No; but was the tender made within the time prescribed by the ordinance?

A. Yes, your honor.

Q. To get the discount?

A. Yes, your honor.

Q. So that the tender——

A. Was made on the 11th day of December.

Q. Then the amount tendered at that time was the amount that the city ordinance provided for at that time?

A. Yes, sir.

Q. For premises of that kind?

A. Yes, sir.

Q. But was how much less?

Mr. PARTRIDGE: It was at least four dollars less, at least four dollars less than the rate provided for and demanded by the Rogers Park Water Company.

The COURT: It was.

160 Mr. PARTRIDGE: Yes, sir; according to the rates prescribed in the ordinance introduced in evidence.

Which was all the evidence offered or received on the trial of said cause.

And thereupon, at the request of the plaintiff's counsel, the court instructed the jury as follows:

"The jury are instructed to find the issues for the petitioner;" to the giving of which instruction the defendant, by its counsel, then and there duly excepted.

And thereupon counsel for the defendant requested the court to give to the jury the following instructions:

1. "The court instructs the jury that the burden of proof is upon the petitioner to prove the allegations of his petition which have been denied by the defendant. Upon such issues he must sustain his side of the case by a preponderance or the greater weight of testimony before you can find in his favor upon them."

2. "The court instructs the jury that the ordinance and proceedings which have been introduced in evidence and under which the defendant located and constructed its water works and system for pumping and distributing water are valid and binding on the petitioner in this case, and that the defendant was entitled to demand and receive from the petitioner the rates for water therein provided for; and if the jury find from the evidence that the petitioner Fergus refused to pay the said rates, then such refusal was wrongful and he cannot recover."

161 3. "If the jury find from the evidence in this case that the defendant, The Rogers Park Water Company, is engaged in the business of pumping and distributing water in the portion of the city of Chicago alleged in said petition, and that the said pumping works and water pipes and appliances of said defendant have been constructed and located pursuant to the ordinance which has been shown in evidence, and that the said works have been accepted by the board of trustees of said village of Rogers Park, then the court instructs the jury as a matter of law that the petitioner cannot question or deny in this proceeding that the said works and water pipes have been properly constructed and located, nor that the said ordinance is valid."

4. "The court instructs the jury as a matter of law that the petitioner cannot in this case deny or question the validity of the proceedings and ordinances under which the defendant, The Rogers Park Water Company, located and constructed its said water works, pipes, and system."

5. "The court instructs the jury that the ordinance and proceedings under which the defendant located and constructed its said

water works, if the jury find from the evidence that the defendant did so locate and construct said works, together with the acceptance of said ordinance, the location and construction of said water works by the defendant, and the assignment of said ordinance by said Keeler to the defendant, if the jury find from the evidence that said ordinance was so assigned, and the acceptance of said water works by the board of trustees of said village of Rogers Park, and the continuous operation of said water works and compliance with the terms and conditions of said ordinance by the defendant, if the jury so find from the evidence, constituted a valid contract which
162 was binding alike upon said city of Chicago and the Rogers Park Water Company, and that the city of Chicago had no legal right to pass the said ordinance mentioned in said petition without the consent of the defendant, and that said ordinance was void and not binding on the defendant."

6. "The court instructs the jury that if they find from the evidence that the petitioner, J. B. Fergus, as owner, signed and delivered to the defendant an application for a supply of water for the premises in said petition described before said premises were connected with the water mains of the defendant, as therein alleged; that said application so signed by him provided that said water should be supplied to him subject to the rules and regulations of said defendant company then in force or which might thereafter be enacted or adopted, and that said rules and regulations provided for the payment for water by said Fergus according to the terms and at the rate demanded of said Fergus by the defendant for the half year from the 1st of November, 1897, to the 30th of April, 1898, inclusive, and that pursuant to said application and in consequence thereof the defendant proceeded to have its said water mains tapped and a supply provided through said mains and a connecting pipe, as alleged in said petition, then the said application and its acceptance by the defendant constituted a contract binding in law on said Fergus; and if the jury further believe from the evidence that said rules and regulations provided for the rate of payment by the petitioner for such supply of water, and that the supply of water for said premises was shut off by the defendant in consequence of a
163 refusal or the neglect of said Fergus to pay for said supply of water as provided in the said rules and regulations, then the petitioner cannot recover in this case, and your verdict must be for the defendant."

7. "The jury are instructed to find — favor of the defendant."

But to give the said instructions or either of them to the jury the court then and there refused; to which refusal of the court to give the said instructions and each of them to the jury counsel for defendant then and there duly excepted.

The COURT: The jury are instructed to find the issues for the petitioner.

Mr. BARTON: I ask the court for judgment ordering a peremptory writ of mandamus.

Mr. PARTRIDGE: I desire to move at the proper time for a new trial, of course.

The COURT: Motion — new trial by defendant overruled and exception.

Mr. PARTRIDGE: In arrest of judgment.

The COURT: And motion in arrest of judgment overruled and exception.

And forasmuch as the matters and things aforesaid do not otherwise appear of record in said cause, the defendant, by its counsel, presents this its bill of exceptions and prays that the same may be signed and sealed by the judge of said court as provided by law, which is accordingly done this 14th day of April, A. D. 1898.

ELBRIDGE HANECY, *Judge.* [SEAL.]

O K.

JESSE B. BARTON,
Attorney for Petitioner.

164 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN B. FERGUS
vs.
ROGERS PARK WATER COMPANY, a Corporation, etc. } Petition for Mandamus.

It is hereby stipulated by the parties in the above-entitled cause, by their respective counsels, that the original bill of exceptions may be used as part of the record in said cause upon an appeal thereof instead of a transcript of said bill of exceptions.

Dated Chicago, April 11th, A. D. 1898.

JESSE B. BARTON,
Attorney for Petitioner.
PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

Be it remembered that heretofore, to wit, on the 25th day of March, A. D. 1898, a certain appeal bond was filed in the office of the clerk of said court in words and figures following, to wit:

165 Know all men by these presents that we, Rogers Park Water Company, as principal, and Hervey E. Keeler, as surety, of the county of Cook and State of Illinois, are held and firmly bound unto John B. Fergus, also of the same county and State, in the penal sum of two hundred and fifty ($250) dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, jointly, severally, and firmly, by these presents.

Witness our hands and seals this 25th day of March, A. D. 1898.

The condition of the above obligation is such that whereas the said John B. Fergus did on the 25th day of March, A. D. 1898, in the circuit court of Cook county, in the State aforesaid, and of the March term thereof, A. D. 1898, recover a judgment against the

above-bounden Rogers Park Water Company for costs of suit: from which said judgment of the said circuit court of Cook county the said Rogers Park Water Company has prayed for and obtained an appeal to the supreme court within and for the said State:

Now, therefore, if the said Rogers Park Water Company shall duly prosecute its said appeal with effect, and, moreover, pay the amount of the judgment, costs, interest, and damages rendered and to be rendered against it in case the said judgment shall be affirmed in said supreme court, then the above obligation to be void: otherwise to remain in full force and virtue.

[CORP. SEAL.]

ROGERS PARK WATER COMPANY, [SEAL.]
By H. E. KEELER, *President.* [SEAL.]
HERVEY E. KEELER. [SEAL.]

Approved:
JOHN A. COOKE, *Clerk.*

166 STATE OF ILLINOIS, }
Cook County. }

I, John A. Cooke, clerk of the circuit court of Cook county and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of a record, except the bill of exceptions, the original of which is incorporated herein by stipulation, in a certain cause lately pending in said court on the common-law side thereof, between John B. Fergus, petitioner, and Rogers Park Water Company (a corp.), defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 21st day of April, 1898.

[SEAL.] JOHN A. COOKE, *Clerk.*

167 In the Supreme Court of Illinois, June Term, 1898.

ROGERS PARK WATER COMPANY, Appellant,
vs.
JOHN B. FERGUS, Appellee. } Appeal from Circuit Court, Cook County.

Assignment of Error.

Now comes this defendant, by Partridge & Partridge, its attorneys, and shows to the court here that there is manifest error in the said records and proceedings in this:

1. Said court erred in improperly admitting evidence upon the trial of said cause on behalf of petitioner against the objection of the defendant.

2. Said court gave improper instructions to the jury upon the trial of said cause at the request of the petitioner and against the objection of the defendant.

3. Said court refused proper instructions to the jury upon the trial of said cause which were requested by the defendant.

4. Said court improperly overruled the demurrer of the defendant to the fourth plea of the petitioner.

168 5. Said court improperly sustained the demurrers of the petitioner to the first answer of the defendant.

6. Said court improperly sustained the demurrers of the petitioner to the third answer of the defendant.

7. Said court erred in overruling defendant's motion for a new trial.

8. Said court erred in overruling defendant's motion in arrest of judgment.

9. Said court erred in rendering and entering judgment upon the verdict in favor of the petitioner and against the defendant.

10. Said proceedings are otherwise erroneous.

Wherefore the appellant prays that the said judgment may be reversed, etc.

PARTRIDGE & PARTRIDGE,
Attorneys for Defendant.

169 And afterwards, to wit, on the ninth day of June, A. D. 1898, the same being one of the days of the term of court aforesaid, the following proceedings were had by said court and entered of record in the words and figures following, viz:

ROGERS PARK WATER COMPANY
vs.
JOHN B. FERGUS. } 337. Appeal from Cook.

And now, on this day, comes the said appellant, by Partridge & Partridge, attorneys, and moves the court for an extension of time in which to file briefs.

Which motion is by the court taken under advisement.

170 And afterwards, to wit, on the tenth day of June, A. D. 1898, certain proceedings were had by said court and entered of record in the words and figures following, viz:

ROGERS PARK WATER COMPANY
vs.
JOHN B. FERGUS. } 337. Appeal from Cook.

And now, on this day, the court having duly considered the motion of appellant for time to file briefs herein, and being fully advised in the premises, it is considered and ordered by the court that the time — file appellant's briefs herein be extended to June 15th.

171 And afterwards, to wit, on the 20th day of June, A. D. 1898, certain proceedings were had by said court and entered of record in the words and figures following, viz:

ROGERS PARK WATER COMPANY
vs.
JOHN B. FERGUS. } 337. Appeal from Cook.

And now, on this day, comes the said appellant, by counsel, and moves the court for an extension of time to file a brief herein in reply to the brief of appellee.

Which motion is taken under advisement by the court.

172 And afterwards, to wit, on the day and year last aforesaid, certain other proceedings were had by said court and entered of record as follows:

ROGERS PARK WATER COMPANY
vs.
JOHN B. FERGUS. } 337. Appeal from Cook.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that appellant hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

173 And afterwards, to wit, on the 22nd day of June, A. D. 1898, certain proceedings were had by said court and entered of record, among which is the following, viz:

ROGERS PARK WATER WORKS
vs.
JOHN B. FERGUS. } 337. Appeal from Cook.

And now, on this day, the court having duly considered the motion of appellant for an extension of time to file reply briefs herein, and being fully advised in the premises, it is considered and ordered by the court that time to file reply briefs herein be overruled and denied.

174 At a supreme court begun and held at Springfield on Tuesday, the seventh day of February, in the year of our Lord one thousand eight hundred and ninety-nine, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice;

Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to wit, on the seventeenth day of February, A. D. 1899, the same being one of the days of the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

ROGERS PARK WATER COMPANY, a Corporation, v. JOHN B. FERGUS. } No. 337. Appeal from Cook.

And now, on this day, this cause having been argued by counsel, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error; therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said appellee recover of and from the said appellant his costs by him in this behalf expended, and that he have execution therefor.

175 At a supreme court begun and held at Springfield on Tuesday, the 7th day of February, in the year of our Lord one thousand eight hundred and ninety-nine, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jessie J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the seventeenth day of February, 1899, the opinion of the court was filed in the words and figures following, to wit:

ROGERS PARK WATER CO. vs. JOHN B. FERGUS. } No. 199. Error to —. Appeal from Cook.

176 Docket No. 337.—Agenda 56.—Northern Div.—June, '98.

ROGERS PARK WATER COMPANY vs. JOHN B. FERGUS.

Mr. Justice BOGGS delivered the opinion of the court:

On the 12th day of November, 1888, the village of Rogers Park, in Cook county, was organized under the general act providing for the incorporation of cities and villages. On the 4th day of April, 1893, the village was annexed to and became a part of the city of Chicago. The appellant company is a corporation organized under the general statute providing for the formation of corporations, the object for which it was incorporated being "to locate, construct, and operate a system of water works in the village of Rogers Park." On the 4th day of October, 1897, the city council of the city of Chicago passed an ordinance fixing the maximum rates to be charged for water furnished to the inhabitants of that part of the territory of the said city which had formerly composed the village of Rogers Park, making water rates in such territory uniform with the rates provided by other ordinances to be paid in other portions of the city. The appellee, who occupied premises situate within the former limits of the said village of Rogers Park, which premises were supplied with water from the water mains of the appellant company, filed this a petition for a writ of mandamus to require the appellant company to furnish water at the rates fixed by the said ordinance of the city of Chicago. The appellant company pleaded the village of Rogers Park, prior to the annexation thereof to the city of Chicago, on November 12, 1888, adopted an ordinance granting to it the exclusive right of laying pipes and mains and other conduits in the streets, alleys, and public places in the said village, for the purpose of furnishing and conducting an adequate supply of water to said village, and the inhabitants thereof, for public and private use for and during the period of thirty years, and by the same ordinance fixed the rates to be charged to individual consumers of water during the said period of thirty years; and that in pursuance of said ordinance it completed and put in operation a system of water works, and was ready and willing to furnish the appellee with water at the rate fixed by the said ordinance of the said village of Rogers Park, and that it was not legally required to accept the rates fixed by the ordinance of the city of Chicago, the maximum rates fixed by the city of Chicago
177 being lower than the maximum rates fixed by the ordinance of the said village for the same service. After a trial the court entered a judgment awarding a peremptory writ as prayed by the appellee, from which judgment this appeal is prosecuted.

The appellant corporation voluntarily sought corporate existence

in order to enable it to engage in an enterprise essentially public in its character, in the prosecution of which it would be necessary the property of the corporation should be devoted to a use in which the public had an interest. For the accommodation of the business it designed to pursue it was necessary it should secure, and it did secure a special privilege to occupy the streets, alleys and public places of the village of Rogers Park. This license was granted because it was engaged in a business of extreme necessity to the inhabitants of the village. It is not a private but a *quasi* public corporation, and is subject to be controlled by the public with relation to the rates to be exacted for the commodity it was created to supply to the public. Power is possessed by the State to prevent extortion by such *quasi* public corporations, and to restrict them to the exaction of reasonable rates and charges. (*Munn v. People*, 69 Ill., 80; *Ruggles v. People*, 91 *id.*, 256; *Munn v. People*, 94 U. S., 113; *Spring Valley Water Works v. Schotten*, 110 *id.*, 347; Beach on Public Corp., secs. 2, 3; *Hanger v. Water Co.*, 28 Pac. Rep., 244; Tiedeman on Limitation of Police Power, sec. 93.) We do not understand counsel for appellant antagonize this as the true view of the law. But the position of the appellant company seems to be, the alleged ordinance of the village of Rogers Park was a proposition on the part of the village to it to construct and maintain a system of water works in the village for a period of thirty years, and that to induce it to accept such proposition and provide a supply of water for the village and its inhabitants the rates to be paid by the village and by the inhabitants thereof for water during that period were fixed and prescribed by the terms and conditions of the ordinance; that it accepted said ordinance in view of the prices and rates so fixed, and having constructed the system of water works in accordance with the provisions of the ordinance, and having in all other respects complied with its terms, the ordinance, the acceptance thereof and fulfillment by it of all things required to be done upon its part constituted a binding, irrevocable contract.

178 The ordinance of the city of Chicago requires the appellant company shall accept the same scale of prices for the water supplied to the inhabitants of that part of the said city which was formerly embraced within the limits of the village of Rogers Park as is paid by the consumers of water in other portions of the city. This scale of prices is lower than the rates fixed by the alleged ordinance of the village of Rogers Park. The argument of counsel for the appellant company is, that the provisions in the alleged ordinance of the village of Rogers Park fixing the rates to be charged by it for water, and its acceptance of the said ordinance and compliance therewith, constitute a property right of the appellant company and an irrevocable contract right, and that the ordinance of the city of Chicago contravenes section 2 of article 2 of the constitution of 1870, which provides no one shall be deprived of property without due process of law, and also is in violation of section 14 of the same article of the constitution, which prohibits the enactment of any law impairing the obligation of a contract,

and that for these reasons said ordinance of the city of Chicago is void.

We do not think the adoption of the alleged ordinance by the village of Rogers Park and the acceptance and fulfillment of the conditions thereof by the appellant company vested it, as with a property right, with the power to demand that the rates named in the ordinance should remain fixed and unchanged for the period in which it was licensed to occupy the streets of the village, or that the ordinance and its acceptance constituted a contract, or that any contract obligations arose by reason thereof. The appellant company stood charged with a legal duty to supply water to the inhabitants of the village for a reasonable compensation. It received corporate existence in order to enable it to discharge that duty, and the State possessed ample power to enforce the performance of that duty. The power possessed by the State to enforce the duty might be properly exercised by establishing a scale of rates and prices to be demanded by the company from the inhabitants of the village, and this power, and that mode of exercising it, were delegated by the State to the village by section 1, article 10, chapter 24 of our statutes. (Starr & Curtis' Stat. 1896, p. 785.) The village exercised the power by incorporating in the ordinance a scale of prices as being just and reasonable maximum rates to be
179 paid to the company by the consumer of water. This provision of the ordinance had no effect to establish a contract between the appellant company and the village that the individual inhabitants of the village should and would pay such rates for the period of thirty years, or any fixed period of time, but was simply a declaration on the part of the village that such rates were reasonable. The legal effect was to establish, *prima facie*, the corporation, in order to discharge the duty it owed to the public, must supply the commodity it had been created to supply at the prices named in the ordinance. It was a mode of regulating and enforcing the discharge of a legal duty—not a proposition looking toward a contract. No contract was necessary to create an obligation on the part of the corporation to supply water at a reasonable rate, for that rested upon it as a duty.

Nor did the fixing of rates by the alleged ordinance of the village of Rogers Park vest in the appellant company an irrevocable right to exact such rates for the period it had been granted permission to occupy the streets, alleys and public places of the village, or for any fixed period. A rate or price reasonable and just when fixed may, in the future, become so unreasonably high that the exaction of such rate or price is but an extortion. The duty of the corporation does not, however, change, but remains the same,—that is, to exact only reasonable compensation. The power of the State to enforce that duty is not exhausted by its exercise in the first or any subsequent instance, but is continuous, and may be exerted from time to time, whenever necessary to prevent extortion by the agency created by the State to serve the public. Whenever the evil of extortion exists the power to eradicate it may be successfully invoked. In the exercise of that power by the State, or by a municipality

exercising the power by delegation from the State, there is no admixture whatever of any contractual element, nor does the corporation against whom the power is exercised obtain any vested property interest or property right in the scale of rates deemed at any particular time to be reasonable maximum prices for the article to be supplied by the corporation. The annexation of the village of Rogers Park to the city of Chicago operated to clothe the city council of the city with ample authority to determine, *prima facie*,
whether the rates demanded by the appellant company for
180 water supplied to the inhabitants of that part of the city
which was formerly within the limits of the village were reasonable, and to enact an ordinance reducing such rates if deemed by the council to be extortionate.

It is suggested the members of the city council are elected by the people, and are agents of the people, and that the action of the council in fixing the prices to be paid for water is, in effect, that of those who are to purchase water, and is therefore violative of the general principle no man shall be a judge of his own case. If there is any force in this view it is destructive of the doctrine, in its entirety, that the State is possessed of power to restrict, within reasonable limits, the charges of *quasi* public corporations, for the State acts through the members of the General Assembly, who are the agents and representatives of those who are to be benefited by such restrictions. The suggestions omit from consideration the controlling fact that *quasi* public corporations are created by the State for the good of the public,—to serve the public,—and that they accept corporate life subject to the power retained by their creator to regulate and control them for the public good. The General Assembly is the legislative department of the State, and the city council is the governing board, and in a sense the legislative department, of the city. The members of each of those bodies act in their official capacity, and are bound, in morals and in law, to act honestly, conscientiously and impartially, and with due regard for the rights and interests of all who may be affected by their official determination. The best interests of the public will not be subserved by denying fair and reasonable profits and gain for services to be rendered by *quasi* public corporations to the people, for the reason that if insufficiently remunerated such corporations cannot exist. The public good, therefore, demands unselfish, conscientious and patriotic treatment of the question at the hands of those entrusted with the duty and power to consider and determine as to the interests of the people and of the corporations, which, properly viewed and judged, are and should be mutual. It is not to be assumed a duty so obvious will be willfully disregarded, and that narrow and selfish considerations will prevail and control such representative bodies. Nor are the corporations left without remedy against unwarranted and unjustifiable acts of the municipal council. If the scale of rates
181 established by a city council is deemed by the corporation
to be unreasonably low and unjust, it is expressly provided the action of the council may be reviewed and determined by the

courts on application of the corporation. Starr & Curtis' Stat. 1896, chap. 24, par. 458, p. 868.

The contention here is not that the rates fixed by the city council of Chicago are so low as to be oppressive, but that the rates fixed by the ordinance of the village are unalterable for a period of thirty years. That contention cannot be maintained. Appellee, on May 17, 1897, signed an application to the appellant company to be supplied with water, "subject to the rules and regulations of the company now in force or hereafter to be enacted or adopted, which rules and regulations are hereby made and declared to be part of the contract between me (appellee) and the said company for supplying said premises with water." The application was accepted and appellee received water thereunder, and paid the rates fixed by the ordinance of the village, and the rules of the company framed thereunder, until December 11, 1897. On October 18, 1897, the city council of the city of Chicago adopted the ordinance reducing the rates, and on December 11, 1897, appellee tendered payment for a future supply of water according to such reduced rates, which being refused, he filed this petition to require the appellant company to submit to the provisions of the ordinance of the city as to the amount to be paid by him. There is no force in the insistence his application and its acceptance constituted a contract on his part to pay indefinitely, or during the period of thirty years, at the rate fixed by the rules and regulations of the company framed under the ordinance of the village. It but bound him to pay such rates only so long as the appellant had lawful right to demand and receive the prices fixed by the ordinance of the village. The rules and regulations in force referred to in the application became inoperative by force of law as to the rate to be paid when a new scale of rates was established by the ordinance of the city.

The view we have taken of the question here involved rendered it unnecessary we should determine the contention of the appellee that the alleged ordinance of the village, set out in the pleading by the appellant company, had not been legally adopted by the board of trustees of the village.

The judgment is affirmed.

Judgment affirmed.

182 STATE OF ILLINOIS, } ss.
Supreme Court, }

I, Christopher Mamer, elected clerk of the supreme court in and for the northern grand division of the State of Illinois and keeper of the records and seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said supreme court in the above-entitled cause of record in my office.

This copy is not to operate as a mandate in any event. Mandate will be issued only on request and payment of costs.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Springfield, Ap'l 20, 1899.

[Seal of the Supreme Court, State of Illinois. Aug. 23, 1818.]

C. MAMER,
Clerk of the Supreme Court.

183 At a supreme court begun and held at Springfield on Tuesday, the fourth day of April, in the year of our Lord one thousand eight hundred and ninety-nine, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the sixth day of April, A. D. 1899, the same being one of the days of the term of court aforesaid, certain proceedings were had by said court and orders entered of record as follows:

ROGERS PARK WATER COMPANY *vs.* JOHN B. FERGUS. } 337. 3 R. H. Appeal from Cook.

And now, on this day, the court having duly considered the petition for rehearing filed herein by the appellant and being fully advised of and concerning the premises, it is considered and ordered by the court that the said petition for rehearing be overruled and denied at the costs of said appellant.

184 In the Supreme Court of Illinois.

ROGERS PARK WATER COMPANY, Appellant, *vs.* JOHN B. FERGUS, Appellee.

Petition for Citation.

To the Honorable Joseph N. Carter, chief justice of the supreme court of the State of Illinois:

Now comes the Rogers Park Water Company, a corporation, by Partridge & Partridge, its attorneys, and shows to the chief justice of the supreme court of the State of Illinois that in the record and proceedings and also in the rendition of the judgment in the above-entitled cause, lately pending in the supreme court of the State of Illinois, between said Rogers Park Water Company, appellant, and John B. Fergus, appellee, and in which final judgment was rendered against said Rogers Park Water Company, appellant, on the sixth (6th) day of April, A. D. 1899, in said suit, it appears by the record now remaining in the supreme court of Illinois that certain rights and priveleges were claimed under the Constitution of the United States by said Rogers Park Water Company, and that said supreme court of Illinois erroneously decided against
185 said rights and priveleges of said Rogers Park Water Company which were specially set up and claimed under such Constitution; and, further, that the validity of the authority exercised under said State of Illinois was drawn in question in said suit by said Rogers

Park Water Company, on the ground that said authority was repugnant to the Constitution of the United States, and the decision of said supreme court of Illinois was in favor of the validity of said authority so exercised; from all of which said Rogers Park Water Company alleges that it appears in the said record and proceedings in said suit manifest error has occurred, to the great damage of said Rogers Park Water Company.

Wherefore said Rogers Park Water Company respectfully asks that there should be granted unto it, under and pursuant to the acts of Congress in such case made and provided, a writ of error from the Supreme Court of the United States to the supreme court of the State of Illinois, that the said record may be reviewed and the said error therein may be corrected and speedy justice done in the premises, and that said writ of error may be made a supersedeas; that a citation may be issued herein, pursuant to law, citing and admonishing the said John B. Fergus to be and appear at the Supreme Court of the United States, at Washington, according to the usual course and practice in such cases; that the supersedeas bond herewith presented to the court may be duly approved, and that such other and further orders and proceedings may be had and
186 entered herein as may be necessary fully to grant to said Rogers Park Water Company the relief herein prayed for, according to the usual course and practice in such cases.

And your petitioner will ever pray, etc.

ROGERS PARK WATER COMPANY,
By H. E. KEELER, *President.*

PARTRIDGE & PARTRIDGE,
Attorneys for Petitioner.

Know all men by these presents that we, The Rogers Park Water Company, a corporation organized and existing under the laws of the State of Illinois, as principal, and Hervey E. Keeler, of Chicago, Cook county, Illinois, are held and firmly bound unto John B. Fergus, his heirs and assigns, in the sum of five hundred ($500.00) dollars; for the payment of which, well and truly to be made, we, said Rogers Park Water Company, for itself, its successors and assigns, and the said Hervey E. Keeler, his heirs, executors, and administrators, bind ourselves, jointly and severally, firmly by these presents.

Witness our hands and seals this 14th day of April, A. D. 1899.

The condition of this obligation is such that whereas the said Rogers Park Water Company was, by the order and judgment of the supreme court of Illinois, made subject to a peremptory writ of mandamus, which order and judgment was entered
187 in said court on the sixth day of April, A. D. 1899, in that certain cause then therein depending, wherein said Rogers Park Water Company was appellant and said John B. Fergus was appellee, on which said day said supreme court denied the petition of said Rogers Park Water Company for a rehearing of said cause;

And whereas, further, said Rogers Park Water Company has sued out a writ of error from the Supreme Court of the United States to reverse the said order and judgment of the supreme court of Illinois:

Now, therefore, if the above-bounden Rogers Park Water Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

ROGERS PARK WATER COMPANY,
By H. E. KEELER, *Its President.*
HERVEY E. KEELER. [SEAL.]

Attest: CHAS. HOWARD, *Secretary.* [SEAL.]

O K.
JESSE B. BARTON,
Att'y for Appellee.

STATE OF ILLINOIS, } ss.:
County of Cook, }

Hervey E. Keeler, being first duly sworn, on oath deposes and says that he is a citizen of the United States and of the State of Illinois and a resident of the city of Chicago; that he executed the above and foregoing bond for the uses and purposes therein men-
188 tioned, and that he is worth one thousand ($1,00-) dollars and upwards over and above all his debts and liabilities in property not by law exempt from execution.

And further affiant saith not.

[SEAL.] HERVEY E. KEELER.

Subscribed and sworn to before me this 13th day of April, A. D. 1899.

LYMAN H. PARTRIDGE,
Notary Public.

The above and foregoing bond is approved this 14th day of April, A. D. 1899.

JOSEPH N. CARTER,
Chief Justice of the Supreme Court of Illinois.

Endorsed on cover: File No., 17,407. Illinois supreme court. Term No., 295. The Rogers Park Water Company, plaintiff in error, *vs.* John B. Fergus. Filed May 12th, 1899.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1899.

THE ROGERS PARK WATER COMPANY,
Plaintiff in Error,

vs.

JOHN B. FERGUS,
Defendant in Error.

In Error to Supreme Court of Illinois.

STATEMENT.

The transcript of record herein is somewhat voluminous, covering 104 printed pages, but in our view it will not be requisite for the court to make a critical examination of it all. We have endeavored to lighten the labor of the court by incorporating a full statement of those parts of the record in this brief and argument upon which, as we think, the issues involved in this case arise.

On the 13th day of December, 1897, John B. Fergus, the defendant in error herein, filed a petition for mandamus against the Rogers Park Water Company, plaintiff in error, in the Circuit Court of Cook County, Illinois. The portions of said petition material on this hearing al-

leged, in substance, that said Fergus was the tenant and occupant of a certain dwelling house and premises therein described, in the City of Chicago, but which premises were located in that part of said city formerly within the Village of Rogers Park, which village was November 12, 1888, and thereafter until April 4, 1893, a municipal corporation organized and existing under the laws of the State of Illinois; and that, on said last named date, said village was annexed to said City of Chicago, which is also a municipal corporation under the laws of said state, and of which said city said premises have ever since been a part.

The petition further alleged that said Rogers Park Water Company was a corporation, incorporated on or about January 24, 1889, under the laws of said state, having for the object of its incorporation to locate, construct and operate a system of water works, with all appliances for pumping and distributing water in the Village of Rogers Park in said Cook County, Illinois, and its vicinity; to own all real estate used in connection therewith; and to construct and operate all machinery and appliances to furnish electricity for light, heat and power in said locality.

That said Rogers Park Water Company did proceed to locate, construct and put in operation a system of water works, with all appliances for pumping and distributing water in said Village of Rogers Park, including water mains and supply pipes in said village laid in and along the public streets; and on or about May 9, 1897, laid a water pipe in the street in front of said premises, which pipe was connected with the pumping works of said water company, and was used to distribute water to occupants of premises along said street, and that petitioner's prem-

ises were connected by the usual water supply pipe with such water main, in which supply pipe was constructed a cock for the purpose of letting in and shutting off the water supply.

That by reason of its incorporation, as aforesaid, and the location, construction and operation of said system and the laying of water mains in the streets, said water company had become and was a common distributor of water to the inhabitants of the territory formerly the Village of Rogers Park (now included in Chicago), and held itself out as such.

That October 4, 1897, the city council of Chicago passed an ordinance which was duly approved by the mayor, in which it was ordained that the maximum rates and charges for the supply of water furnished by the Rogers Park Water Company to the inhabitants of that part of the City of Chicago in which said company had been or might be authorized to lay water mains and supply pipes was established and fixed so as to be uniform and equal in every particular with those charged by the City of Chicago for water supplied from the city water works.

That the rates due from petitioner computed on the basis prescribed as maximum rates by said ordinance, and allowing rebate for prompt payment given by Chicago, for water supplied from the city water works, amounted to $8.72 in advance, for the current half year from November 1, 1897, to May 1, 1898.

That said premises were supplied with water from said water works on and before November 1, 1897, and that the petitioner had duly tendered said sum of $8.72, and had requested and demanded that said company turn on

the said water supply to said premises, but said company refused so to do unless and until said petitioner paid $13.50 for the water supply to said premises for the half year beginning November 1, 1897.

That he was ready and willing to pay said sum of $8.72, and that said company had assumed the duty, and it was its duty, to so supply water to said premises on payment of said sum, and that petitioner had the clear legal right to such supply, and therefore prayed for a writ of mandamus to issue from said court directed to said Rogers Park Water Company, commanding it to receive said sum of $8.72 from the petitioner, and to turn on the supply of water to said premises, etc. The petition is found printed in full in the transcript of record, pp. 6–9.

The petition was duly verified, and after various proceedings, including the restoration of the files which had been lost, and which has resulted in the duplication of a large portion of the pleadings in the record, but which proceedings are not material on this hearing, certain amended answers were filed by said Rogers Park Water Company, to which the attention of the court must be invited.

We think it will be necessary to examine only the amended answer, printed in the Transcript of Record, pp. 44–56, and which was filed, by leave of court, January 28, 1898. This answer, called in the margin "3rd Ans.," alleged that the petitioner ought not to have or maintain his said action because said Village of Rogers Park, which was a municipal corporation, etc., on and before November 12, 1888, then desired to obtain a supply of water for public use, but said village was prohibited by law from raising by public taxation the

amount of money requisite to build and operate a system of water works to pump and distribute a water supply for fire protection, and for the use of the inhabitants of said village; and that, in order to obtain a supply of water for public use in the manner and form by statute provided, the board of trustees of said village, before said November 12, 1888, applied to one H. E. Keeler to build and operate a system of water works, with all appliances for pumping and distributing water in said village; and thereupon, on said November 12, 1888, the board of trustees of said village passed an ordinance entitled and in substance, as follows:

"An ordinance to provide for supply of water to the Village of Rogers Park, Illinois, and its inhabitants; contracting with H. E. Keeler, his successors and assigns, for a supply of water for public use, and giving the said Village of Rogers Park, Illinois, an option to purchase the said works.

"Be it ordained by the Board of Trustees of the Village of Rogers Park, Cook County, Illinois:

"Section 1. That in consideration of the public benefit to be derived therefrom, the Village of Rogers Park, Illinois, hereby grants the exclusive rights and privilege for the period of thirty years from the time that this ordinance takes effect unto H. E. Keeler, his successors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and the said village hereby grants the exclusive right of using the streets, alleys, public squares and all other public places within the corporate limits of said village as they now exist, or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for furnishing, storing and conducting an adequate supply of good, wholesome, clear water to the said village and to its inhabitants for public and

private use, and for making repairs and extensions to the said system from time to time, during the period in which this ordinance shall be in force."

Section 2 provides for the size and quality of mains; that hydrants for fire protection of a certain quality, etc., should be located and erected on the first five miles of mains, with gates and valves in the mains, and for pumping machinery with capacity and tests as provided, together with a stand-pipe for the storage of water.

"Sec. 3. In consideration of public benefits and the protection to property resulting from the construction of the said system of water works, the said village hereby agrees to pay an annual rental for fire protection to the said grantee, his successors and assigns, for not less than five miles of mains within the corporate limits of said village, for the aforesaid period of thirty years, at the annual rate of $575 for each mile of mains, to be payable semi-annually on the 1st days of July and January in each year. Also, the Village of Rogers Park agrees to pay all municipal or village taxes which may be assessed against the plant of the said grantee or assigns, for the first ten years the water works are operated. The rental for fire protection of mains in excess of said first five miles, as hereinafter provided, at the request of the said village shall be at the annual rate of $400 for each mile of mains, payable as aforesaid during the unexpired period of the said original term of thirty years. The rental shall begin at such time as the said grantee or assigns shall begin to maintain continuously a pressure of forty pounds per square inch. * * *"

"Sec. 4. * * * Said grantee, his successors or assigns, in consideration of the rentals herein agreed to be paid, and in consideration of rights and privileges granted, expressly agrees on it part to furnish to said Village of Rogers Park, and to the residents thereof, an adequate supply of good, wholesome and clear water, fit for culinary and drinking purposes; said

water to be taken from Lake Michigan at such a point near the north boundary line of said village as will best insure its freedom from sewage contamination, and it shall be filtered by the most modern and by an acceptable process before being delivered into the mains for supplying said village, and if said grantee, his successors and assigns, shall at any time fail to furnish a supply of water to said village and the residents thereof, of the quality and quantity provided for in this ordinance, then all rentals to be paid by said village to said grantee or assigns shall cease until said grantee or assigns shall provide and supply water of the degree of purity and in the quantity provided for in this ordinance. * * * Said grantee or assigns further agrees to furnish such steam as may be needed for running one or more air compressors to be furnished by said village and located in the pumping station of said grantee or assigns; the total power used by said air compressors shall at the outset not exceed ten horse power. All power in excess of that above provided, which said village may need for running air compressors, shall be furnished by said grantee or assigns at a cost of $75 per horse power per annum."

"Sec. 5. Upon the completion of the construction of the said system of water-works, the said grantee or assigns shall notify the board of trustees of said village to that effect, and thereupon submit the works to such a test as will show the capacity of the works to be sufficient to throw water through 100 feet of two and one-half inch hose and one-inch nozzle from each of six (6) different hydrants not located on the same main, to a height of ninety feet above the level of the ground at the Chicago and North-Western Railroad depot when the air is still. The performance of this test shall be a fulfillment by the grantee or assigns of the terms and conditions of this ordinance so far as relates to strength and capacity. Said grantee or assigns shall so maintain and enlarge said water-works that they will at all times be capable of performing such tests, and

said village board shall have the right to order a repetition of such tests annually by giving said grantee or assigns a written notice of thirty days, and a failure on the part of said grantee or assigns to make such tests shall cause a suspension of said rental of mains until said grantee or assigns successfully performs said test."

"Sec. 6. Within sixty days after the day that this ordinance takes effect, the said grantee or assigns shall file a written acceptance thereof in the office of the village clerk, and at least five thousand dollars work and material on said works shall be done and furnished before December 31, 1888. The construction of said water-works shall be commenced within sixty days after this ordinance takes effect, and said works shall be completed within one year after the commencement of the construction thereof. * * *"

Section 7 provides that said village board of trustees shall from time to time pass and enact ordinances under suitable penalties providing for the protection of said works from damage, fraud or imposition.

"Sec. 8. At the expiration of ten years after the completion of the said works and at the expiration of each succeeding period of five years thereafter, the said village shall have the right and privilege to purchase the said system of water works, provided they notify the said grantee or assigns of their intention so to do at least six months before the expiration of said period or periods of years. The value of said system shall be ascertained as follows: The said grantee or assigns and the said village shall each appoint one person, and the two appointees shall choose a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of the said system of water works. In case the two experts chosen disagree upon the selection of the third he shall be appointed by a judge of the Circuit Court of some adjoining circuit. None of the board shall

be residents of the Village of Rogers Park, Illinois. The said board in fixing the value of said work shall take into consideration the value of the franchise, the value of water rights and right of way, the revenue from the works and all other facts and considerations legitimately connected with the said work. The said village shall within sixty days after the said board has rendered its decision pay the amount awarded in cash, and upon such payments the said grantee or assigns shall transfer to the said village all their said rights and privileges and property included in said appraisement."

"Sec. 9. The said grantee or assigns shall make extensions of mains whenever called upon to do so by the village board of the said village, provided, however, that said extensions shall not be less than 500 feet in length, and further, provided, that there shall be one consumer for each 100 feet along the line of such extension who shall agree to take water at the established rates for a period of at least two years, but as a condition of making such extensions the village agrees to pay for public fire service upon such extensions at the rate of $400 per annum for each mile of such extension for the unexpired term of this franchise and contract."

Section 10 provides for a fire pressure of sixty pounds in the mains, and right of repair is given.

Section 11 provides that said grantee or assigns shall have the right to make alter, amend and enforce rules for governing the connections with their mains, and the use of the water and for preventing waste of water.

Section 12 provides that said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise and that they shall have the right at any time to insert a water meter into the service pipe of any consumer, and to charge and to collect from him at meter rates, provided that in such case the minimum annual rate to be paid by anyone shall be $5. Said rates are, in part, as follows:

Bath, private, each tub	$3 00
Dwelling houses, five rooms or less, for family	6 00
Dwelling houses, each additional room	1 00
Hose for sprinkling lawn—sixty-six foot frontage per year	5 00
Hose—each foot in excess of sixty-six feet	05
Wash basins, stationary, first basin in private family free—all others, each	3 00
Water closets, per bowl	3 00

Section 13 provides that a sufficient tax shall be levied and collected annually upon all taxable property in said village, subject by law to such taxation, to meet the payments under this ordinance as they respectively mature, during the existence of any contract for public fire service, which tax shall be irrepealable from and after the passage of this ordinance, and in case the said village shall be authorized to levy a special tax for such purpose such tax shall be annually levied and the proceeds thereof shall be kept as a separate fund to be known as the fire hydrant fund.

"Sec. 14. Within sixty days after the passage of this ordinance said H. E. Keeler, his successors or assigns, shall file with the village an acceptance of the same, which acceptance, duly acknowledged before some officer authorized to administer oaths, shall have the effect of a contract between the village and said H. E. Keeler, his successors or assigns.

"Passed November 12, A. D. 1888.

"JOHN L. HEALY,
"*Village Clerk.*

"Approved November 12, A. D. 1888.

"HENRY P. DALY,
"*President Board of Trustees.*"

This ordinance bore the regular endorsements showing its passage and is printed in full. (Tr. of Rec., pp., 44-51.)

The answer further alleged that said ordinance was duly

published and became a valid ordinance of said village. That it was then known and understood by said village. and the board of trustees that said grantee was not possessed of sufficient means to build said water works and that said ordinance was passed to enable him to negotiate with other persons on the faith of said ordinance and the agreements and stipulations therein of said village to obtain the necessary capital to build, equip and operate said water works, and that said village and said board of trustees then knew that the only means to make capital invested in said system of water works profitable and to repay the necessary investment, was the rates therein provided to be paid for a supply of water; that the territory of said village was a residence district, so that one of the main sources of revenue—it was then well known—would be the rates to be paid for domestic supplies of water.

That thereupon said Keeler negotiated with different persons to become stockholders or purchasers of bonds of said company, and that relying upon the rights and privileges contained in said ordinance, and particularly upon the rates therein provided to be paid for a supply of water, a large number of persons associated themselves together to incorporate said Rogers Park Water Company and negotiated the sale of bonds of said company to provide the necessary means.

That thereupon, said Keeler afterwards, and on or about January 8, 1889, made and filed his acceptance of said ordinance, in accordance with section 14 thereof, which acceptance is set out in full in said answer.

Said answer admitted the incorporation of said company on or about January 24, 1889, and alleged that

January 31, 1889, said Keeler duly assigned all his rights under said ordinance to said company, which became and was possessed thereof.

Said answer further admitted that said company erected and put in operation a system of water works, including pumping appliances, water mains and supply pipes, and alleged that all this had been done by authority of said ordinance and not otherwise; and said answer insisted that by virtue of the passage and its acceptance by the grantee therein named of said ordinance and by the said assignment and the acceptance thereof by said company, a contract was constituted between said company and said village.

That upon the completion of said water works, the company notified said board of trustees, and said water works were tested as provided in said ordinance and accepted by said village; and that thereafter, previous to said annexation, the hydrant rental reserved in said ordinance was paid to said company by said village, and after said annexation by said City of Chicago.

That the ninth section of said ordinance provided that extensions of mains should be made when ordered from time to time by said board of trustees; that about thirteen miles of additional mains had been ordered and laid besides the first five miles originally provided for, and making about eighteen miles in all of such mains in said territory, belonging to said company, and in service to supply water, and that a large part of such extensions had been ordered and accepted by the common council of said City of Chicago, including the main along the street in front of the petitioner's premises, which extension was ordered January 25, 1897.

That the water rates demanded from the petitioner were the same rates in and by said ordinance prescribed and not other or different rates, and that said rates of $13.50 were the lawfully established rates which the company had the right to charge and demand, and were the customary rates of the company for a like service.

That said ordinance, with the acceptance thereof, and the construction, maintenance and operation of said water works, together with the acceptance thereof by said village and the City of Chicago, as set forth, including the said extensions, constituted and was a contract between said company and said City of Chicago, which contract, together with all rights, privileges, franchises and immunities by said ordinance conferred, are the property of said Rogers Park Water Company, which is entitled to the protection of the laws of Illinois; and which contract, rights, privileges, franchises and immunities are, in like manner, under the protection of the Constitution of the United States, contained in the tenth section of the first article, which forbids any state to pass any law impairing the obligation of contracts; and of the provision contained in the first section of the fourteenth article or amendment to said constitution, which provides that no state shall deprive any person of property without due process of law; that said company therefore claims and insists that the City of Chicago was and is without any power to pass the ordinance alleged in the petition to have been passed October 4, 1897, and insists that any such ordinance, if so passed, was void, illegal and of no effect.

The answer concluded with an allegation that the petitioner was deprived of a water supply solely by reason of his refusal to pay the usual, customary and lawful charges

of the company; to which was added a formal verification.

To this answer a general demurrer was filed, which appears in Transcript of Record, pp. 57-8, and is (omitting the heading), as follows:

> "And now comes the petitioner, by Jesse B. Barton, his attorney, and says that the third amended answer of said defendant originally filed herein on the 28th day of January, 1898, as a further answer, is not sufficient in law to be pleaded to or traversed; and this he is ready to verify. Wherefore he prays judgment."

February 26, 1898, the court sustained said demurrer, and the Rogers Park Water Company elected to stand by its said answer, denominated in said order as its plea. (Printed Transcript of Record, p. 64.)

Certain issues of fact were made upon other pleadings in the case, and a trial resulted in a verdict for the petitioner and judgment on the verdict. It is only necessary to say that the questions arising upon the sustaining of said demurrer to said amended answer have not been waived nor abandoned by the Rogers Park Water Company, but the cause was duly taken by appeal from said Circuit Court to the Supreme Court of Illinois, where the judgment of the Circuit Court, awarding a peremptory writ of mandamus pursuant to the prayer of said petition, was affirmed.

A copy of the opinion of the Supreme Court of Illinois is found at pp. 97–101, Transcript of Record, and the case is reported as *Rogers Park Water Company* v. *Fergus*, 178 Ill., 571.

The assignment of errors in the Supreme Court of Illinois was as follows:

"1. Said Circuit Court erred in improperly admitting evidence upon the trial of said cause on behalf of petitioner, against the objection of the defendant.

"2. Said court gave improper instructions to the jury upon the trial of said cause at the request of the petitioner and against the objection of the defendant.

"3. Said court refused proper instructions to the jury upon the trial of said cause which were requested by the defendant.

"4. Said court improperly overruled the demurrer of the defendant to the fourth plea of the petitioner.

"5. Said court improperly sustained the demurrers of the petitioner to the first answer of the defendant.

"6. Said court improperly sustained the demurrer of the petitioner to the third answer of the defendant.

"7. Said court erred in overruling defendant's motion for a new trial.

"8. Said court erred in overruling defendant's motion in arrest of judgment.

"9. Said court erred in rendering judgment upon the verdict in favor of the petitioner and against the defendant.

"10. Said proceedings are otherwise erroneous.

"Wherefore the appellant prays that the said judgment may be reversed, etc."

The assignments numbered six, eight and nine are the ones to which we invite attention.

At the time of the passage of the ordinance of November 12, 1888, two general acts were in force in Illinois, which related to the power of municipalities to pass ordinances for water works to be built and operated by private enterprise.

The first is as follows:

"An Act entitled 'An Act to enable cities, incor-

porated towns and villages to contract for a supply of water for public use, and to levy and collect a tax to pay for the water so supplied.' (Approved April 9, 1872. In force July 1, 1872. L. 1871–2, p. 271. This title is as amended by act approved June 26, 1885, in force July 1, 1885, p. 64.)

"Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That in all cities, incorporated towns and villages where water works have been or may hereafter be constructed by any person or incorporated company, the city, town or village authorities in such cities, incorporated towns and villages may contract with such person or incorporated company for a supply of water for public use for a period not exceeding thirty years." (As amended by act approved June 30, 1885. In force July 1, 1885, L. 1885, p. 64.)

"Section 2. Any such city or village so contracting may levy and collect a tax on all taxable property within such city or village for the water so supplied."

The second, passed one day later and taking effect on the same day as the first, was the Cities, Villages and Towns Act. The title to that act, and the article and section bearing upon this case, are as follows:

"An Act entitled 'An Act to provide for the incorporation of cities and villages.' (Approved April 10, 1872. In force July 1, 1872. Laws of 1871–2, p. 218.)

"Article X, Section 1. The city council or board of trustees shall have the power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or water works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not to exceed thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or water works."

For illustration of the kind of use of water which the legislature had in mind, we call attention to the following act which was then in force, as follows:

> "An Act entitled 'An Act in relation to the levy and collection of taxes for sewerage and water works in the cities of this state that may have established a system of sewerage and water works for such city." (Approved and in force April 22, 1871.)

The second section contains the following language:

> "The legislative authority of any such city which now has or which may hereafter have established water works for the supply of water to the inhabitants thereof shall have power to annually levy and collect a tax upon the taxable real and personal estate of any not to exceed one mill on the dollar, for the extension of water mains or pipes therein, and the maintenance of such water works." Laws 1871-2, p. 15.

In 1891, some two years subsequent to the completion of the water works in question, the legislature enacted a statute, as follows:

> "An Act to enable cities, towns and villages incorporated under any general or special law of this state to fix the rates and charges for the supply of water furnished by any individual, company or corporation to any such city, town or village and the inhabitants thereof. (Approved June 6, 1891. In force July 1, 1891, p. 85.
>
> "Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That the corporate authorities of any city, town or village, now or hereafter incorporated under the general or special law of this state, in which any individual, company or corporation has been, or hereinafter may be authorized by such city, town, or village to supply water to such city, town or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished

> by such individual company or corporation to such city, town or village and the inhabitants thereof, such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the circuit court of the county in which such city, town or village may be."
>
> 1 S. & C. Ill. R. S., 2nd Ed., p. 868.

This statute was not acted on by the Village of Rogers Park in any manner, but some time after its annexation to Chicago, on or about October 4, 1897, the city council of Chicago passed an ordinance as follows:

> "Section 1. The maximum rates and charges for a supply of water furnished by the Rogers Park Water Company to the inhabitants of that part of the City of Chicago in which said company has been or may be authorized to lay water mains and supply pipes are hereby established and fixed so as to be uniform and equal in every particular with those charged by the City of Chicago for water supplied from the city water works."

The rates thus fixed were considerably less than those established by the ordinance of the Village of Rogers Park of November 12, 1888, under which the works were built.

December 11, 1897, defendant in error tendered rates computed according to the ordinance of October 4, 1897, and demanded that the Rogers Park Water Company, plaintiff in error herein, turn on the supply of water to said premises. This demand was refused on the ground that the amount tendered was not sufficient, and on such refusal the petition for a mandamus was filed. The pleadings admit that the amount tendered was less than the rates fixed and permitted by the original ordinance

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of November 12, 1888, and less than the usual and customary rates charged by the plaintiff in error for like services.

The assignments of error in this court which we desire to present upon this hearing question the validity of the ordinance of October 4, 1897, passed by the city council of the City of Chicago, which ordinance reduces the maximum rates which the Rogers Park Water Company is permitted to charge for water, without its consent, below the rates for water fixed and permitted by the ordinance of the Village of Rogers Park of November 12, 1888, under which the water works of the plaintiff in error were built, and below the usual and customary rates charged by it for water.

It is insisted by plaintiff in error that the Supreme Court of Illinois committed error in holding said ordinance, passed by the city council of the City of Chicago, October 4, 1897, to be valid when said ordinance infringed the vested rights and privileges of the plaintiff in error; and that said judgment upholding the validity of said ordinance and against said rights and privileges of the plaintiff in error, which were specially set up and claimed under the constitution of the United States, was repugnant to the constitution of the United States.

Assignments of Error.

Now comes the plaintiff in error, Rogers Park Water Company, by N. A. Partridge, its attorney, this 14th day of April, A. D. 1899, and shows that in the record and proceedings in the above entitled cause there is manifest error in this, to-wit :

I.

Said Supreme Court of Illinois erred in deciding that the authority exercised under the State of Illinois by the City of Chicago in passing the certain ordinance of the fourth day of October, A. D. 1897, was valid, and in rendering its said judgment in said cause upholding the validity of said authority, which said authority and the exercise thereof was repugnant to the constitution of the United States.

II.

Said Supreme Court of Illinois erred in deciding that the said ordinance of the City of Chicago, passed on the fourth day of October, A. D. 1897, was valid, and erroneously rendered judgment in favor of the validity of said ordinance, which said authority and the exercise thereof was repugnant to the constitution of the United States.

III.

Said Supreme Court of Illinois erred in deciding that the rights and privileges conferred upon said plaintiff in error as assignee of the grantee of said ordinance passed on the 12th day of November, A. D. 1888, by said Village of Rogers Park, were not vested rights, and erroneously entered judgment against said rights and privileges of the plaintiff in error, which were specially set up and claimed under the Constitution of the United States.

IV.

Said Supreme Court of Illinois erred in not overruling the demurrer interposed by the defendant in error to the third answer of the plaintiff in error.

V.

Said Supreme Court of Illinois erred in not reversing the order of the Circuit Court of Illinois awarding a peremptory writ of mandamus in favor of the defendant in error and against the plaintiff in error.

VI.

Said Supreme Court of Illinois erred in rendering judgment in said cause in favor of the defendant in error and against the plaintiff in error.

VII.

Said Supreme Court of Illinois erred in deciding that no contract to pay the rates for water which were charged by the plaintiff in error to the defendant in error existed between said defendant in error and the plaintiff in error by virtue of the application for water and the acceptance thereof in said record appearing, and which decision of said court impairs the obligation of said contract, in violation of the provisions of the constitution of the United States.

Wherefore the said plaintiff in error, The Rogers Park Water Company, prays that the judgment of said Supreme Court of Illinois may be reversed by this honorable court.

NEWTON A. PARTRIDGE,
Attorney for said Plaintiff in Error.

POINTS.

I.

THE VILLAGE OF ROGERS PARK HAD THE RIGHT TO CONTRACT WITH H. E. KEELER AND HIS SUCCESSORS AND ASSIGNS FOR A SUPPLY OF WATER FOR PUBLIC USE.

Said village was a municipal corporation organized under the laws of Illinois. The statutes then in force gave the municipality the right to procure a supply of water for public use.

> Act approved April 9, 1872; in force July 1, 1872. Myers' 1872 Statutes of Ill., p. 460; Starr & Curtis' R. S. Ill., 2nd Ed., p. 865.
>
> Act approved April 10, 1872; in force July 1, 1872. Starr & Curtis' R. S. Ill., Ch. 24, Art. X, Sec. 1.

The right to secure a supply of water for public use has been held to exist in a municipality as implied from the police power and to preserve health; and that such supply of water may be procured by contract as a sanitary and police regulation.

> 1 Dillon Mun. Corp., 3rd Ed., Secs. 146, 443, and cases cited.

The necessity for a supply of water and the power to procure it for the use of the municipality and its inhabitants is recognized in Illinois and throughout the entire United States.

N. O. Gas Co. v. *La. Light Co.*, 115 U. S., 650.

Louisville Gas Co. v. *Citizens' Gas Co.*, 115 U. S., 683.

N. O. Water Works Co. v. *Rivers*, 115 U. S., 674.

City of Quincy v. *Bull*, 106 Ill., 337, 346–352.

Wagner v. *Rock Island*, 146 Ill., 139, 153–158.

Ill. Trust & S. Bank v. *Arkansas City*, 76 Fed. Rep., 271, 281–284.

Walla Walla v. *Walla Walla Water Co.*, 172 U. S., 1.

II.

WHERE THE GRANTEE OF A FRANCHISE HAS ACCEPTED THE GRANT AND PERFORMED THE PUBLIC SERVICE IMPOSED AS A CONDITION OF THE GRANT THE FRANCAISE BECOMES A CONTRACT WHICH IS PROTECTED BY THE CONSTITUTIONAL PROVISIONS WHICH FORBID THE PASSAGE OF ANY LAW IMPAIRING THE OBLIGATION OF CONTRACTS.

2 Dillon Municipal Corporations, Sec. 691.

N. O. Gas Co. v. *La. Light Co.*, 115 U. S., 650.

Louisville Gas Co. v. *Citizens' Gas Co.*, 115 U. S., 683.

N. O. Water Works Co. v. *Rivers*, 115 U. S., 674.

N. O. W. W. Co. v. *St. Tammany W. W. Co.*, 14 Fed. Rep., 194.

Erie Railroad v. *Penna.*, 153 U. S., 628.

Reagan v. *Farmers'*, *etc.*, *Co.*, 154 U. S., 362.

Walla Walla v. *Walla Walla Water Co.*, 172 U. S., 1.

City of Quincy v. *Bull*, 106 Ill., 337, 346-352.

Wagner v. *Rock Island*, 146 Ill., 139, 153-158.

Even a mere license, if acted upon in so substantial a manner that to revoke it would be unjust, ceases to be a license, and becomes a valid contract.

Gregsten v. *Chicago*, 145 Ill., 451, 461-8.

Belleville v. *Citizens'*, *etc.*, *Co.*, 152 Ill., 171, 185-6.

A legislative grant becomes a contract and irrevocable after acceptance.

Dartmouth College v. *Woodward*, 4 Wheat., 518.

People v. *O'Brien*, 111 N. Y., 1.

Fletcher v. *Peck*, 6 Cranch, 87.

Von Hoffman v. *Quincy*, 71 U. S., 535.

1 Dillon Municipal Corp., Sec. 53.

Municipal grants and ordinances give rise to the same rights and are subject to the same constitutional prohibitions as other legislative grants.

Williams v. *Bruffy*, 96 U. S., 176.

N. O. Water W. Co. v. *La. Sugar*, *etc.*, *Co.*, 125 U. S., 18.

N. O. W. W. Co. v. *Rivers*, 115 U. S., 674.

St. Tammany, etc., Co. v. *N. O. W. W. Co.*, 120 U. S., 64.

Von Hoffman v. *Quincy*, 71 U. S., 535.

4 Thomp. Corporations, Sec. 5427-8, 1019.

The definition of "franchise" includes the grant of authority to dig up public streets and lay pipes therein for any public service. This has been settled by a long line of concurring authorities.

2 Dillon Mun. Corp., 3rd Ed., Sec. 691.

N. O. Gas Light Co. v. *La. Light, etc., Mfg. Co.*, 115 U. S., 650.

New Orleans v. *Clark*, 95 U. S., 644.

N. O. Water Works Co. v. *Rivers*, 115 U. S., 674.

"The right to dig up the streets and place therein pipes or mains for the purpose of conducting wate* for the supply of the city and its inhabitants * * r is a franchise, the exercise of which could only be granted by the state, or the municipality acting under legislative authority."

Haugen v. *Albina Light & Water Co.*, 21 Ore., 411, 418.

III.

THE EXPEDIENCY OF MEASURES IS A PURELY LEGISLATIVE QUESTION. WHEN RATES ARE FIXED BEFORE THE ACCEPTANCE OF THE CHARTER OR ORDINANCE, THEY BECOME PART OF THE CONTRACT AND ARE PROTECTED BY THE COTSTITUTION.

"It is insisted, however, that the owner of property is entitled to reasonable compensation for its use, even though it be clothed with a public use, and

that what is reasonable is a judicial and not a legislative question. As has already been shown, the practice has been otherwise."

Munn v. *People, etc.*, 94 U. S., 113, 133.

"But where the legislature steps in and provides a maximum of charges, it operates upon this corporation the same that it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit and make it a part of the charter, and if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference; but it was not, and the company invested its capital relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation"

Ruggles v *People, etc.*, 91 Ill., 256, 264, quoting and following *Chicago, B. & Q. Railroad Co.* v. *Iowa*, 94 U. S., 155.

"Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people."

Peik v. *Chicago & Northwestern Ry. Co.*, 94 U. S., 164, 178.

"Whenever, by accepting such privileges, the grantee becomes bound by an express or implied undertaking to render service to the public, such undertaking will uphold the grant, no matter how inadequate it may be; for, the legislature being vested with power to make grants of that character when the public convenience demands it, the legislative judgment is conclusive both as to the necessity for making the grant and the amount of service to be

rendered; and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant may appear to them."

Godson v. *Winchester, etc., Assn.*, 12 Bush, 114, quoted and approved,

Louisville Gas Co. v. *Citizens Gas Light Co.*, 115 U. S., 700.

"But whether such contract shall be made or not is exclusively for the consideration of the state. * * * Nor can the people or their representatives by any act of theirs afterwards impair its obligation."

Ohio Life Ins. & Trust Co. v. *Debolt*, 16 How., 428, quoted and approved,

N. O. Gas Light Co. v. *Louisiana Light, etc., Mfg. Co.*, 115 U. S., 650.

See, also,

New Orleans Water Works Co. v. *Rivers*, 115 U. S., 674.

Budd v. *State of New York*, 143 U. S., 517.

Brass v. *State of North Dakota*, 153 U. S., 391.

New York, Lake Erie & W. R. Co. v. *Penna.*, 153 U. S., 626.

IV.

THE CONSTITUTIONAL PROHIBITIONS FORBID ANY IMPAIRMENT WHATEVER OF THE OBLIGATION OF CONTRACTS.

Dartmouth College v. *Woodward*, 4 Wheat., 514.

Bronson v. *Kinzie*, 1 How., 319.

McCracken v. *Hayward*, 2 How., 608.

"Any enactment, from whatever source originating, to which a state gives the force of law is a statute of the state within the meaning of the clause cited relating to the jurisdiction of the court.

"The constitutional provision prohibiting a state from passing a law impairing the obligation of contracts equally prohibits a state from enforcing as a law an enactment of that character, from whatever source originating."

Williams v. *Bruffy*, 96 U. S. 176, 183.

N. O. Water Works Co. v. *La. Sugar Ref. Co.*, 125 U. S., 18.

4 Thompson on Corp., Secs. 5427–8.

The ordinance complained of, which was held valid by the Supreme Court of Illinois, was but the exercise by the city of a legislative power which it assumed had been delegated to it by the state, and was therefore in legal intendment the equivalent of laws enacted by the state itself

City Ry. Co., v. *Citizens St. R. R. Co.*, 166 U. S., 557.

Penn. M. L. Ins. Co. v. *Austin*, 168 U. S., 685.

"An unconstitutional law is not a law. It confers no rights; it affords no protection; it imposes no duties; it creates no office; it is in legal contemplation as inoperative as though it had never been passed."

Norton v. *Shelby Co.*, 118 U. S., 425, 442.

ARGUMENT.

I.

The essential points upon which the decision of this case must turn, as it seems to us, are comprised within comparatively narrow limits. If this record discloses no contract or vested rights on behalf of the plaintiff in error, then it can have no standing here, however important may be the questions involved in the case and however sweeping and far-reaching may be the consequences of the decision of the Supreme Court of Illinois from which this writ of error is prosecuted.

If, however, it does appear that the plaintiff in error is possessed of contract or vested rights; that such rights were specially set up and claimed under the constitution of the United States; and that the decision of the Supreme Court of Illinois was against such rights and in favor of the validity of the ordinance to which the force of law was given, the exercise whereof impaired such rights of the plaintiff in error, then this case must be reversed.

There can be no doubt, in our view, that such rights were claimed by plaintiff in error and specially set up and claimed under the constitution of the United States; nor can there be any doubt that the decision of the Supreme Court of Illinois was adverse to the claim of right of the plaintiff in error, and that it did give force and validity to the law or ordinance impairing the obligation of the contract and vested rights thus claimed and set up.

The facts show that a contract was made.

The facts, conclusively established, present the case of a municipality empowered by statute to contract for a water supply for public use, which passed an ordinance in the usual form granting to H. E. Keeler, the grantee therein named, the power and right to erect the system of water works described in the ordinance, and to operate the same for the statutory period of thirty years. In addition to the duty to supply water, as therein provided, the grantee was required to furnish steam to the extent of ten horse power without additional compensation.

The grantee did not have the means to build and equip the works contemplated by the ordinance, and this was understood by the municipality and its representatives, and it was also understood that the ordinance should be used by him as a basis to negotiate for the necessary capital. The rates for water to be paid by such of the inhabitants of the village as should become consumers of a domestic supply of water from the contemplated water works constituted a very material part of the income to be derived from such water works when erected and put in operation. The income expected to be derived from this source formed a material part of the basis of the negotiations so entered upon by the grantee.

Within the sixty days which had been given to him by the ordinance for that purpose, the grantee carried his said negotiations to a successful issue and obtained the necessary capital. Thereupon, he accepted the ordinance and became bound to carry out its terms on his part to be performed during the entire contract period of thirty years.

The ordinance expressly ran to him and to his successors and assigns. Shortly after the acceptance of the ordinance, and during the same month, the Rogers Park Water Company was organized under the general incorporation statute of Illinois (R. S., Chap. 32), and it subsequently and during the same month became assignee of said grantee and thereafter built the water works provided for in the ordinance, and which were duly tested and accepted by the village, and which it has ever since operated.

The extensions of mains provided for in the ordinance were made by the company when ordered by the village, and, in continuation, by the city after annexation, and the hydrant rentals upon both the original system and such extensions have been paid by the village and by the city. The extensions of mains thus ordered and laid were about thirteen miles, while the original system was but about five miles.

Everything required by the ordinance has been done by the grantee and by the company as assignee and successor to H. E. Keeler, the grantee named in the ordinance.

The Village of Rogers Park had the right to procure a supply of water for the use of said village and of its inhabitants.

Such use of water is a public use, and this is equally true whether the water is employed in extinguishing fires, flushing sewers and for like purposes, or consists in furnishing an abundant supply of pure, wholesome water to the inhabitants of the municipality for domestic and individual use. Safety, health and convenience are the

objects in each case, and it is solely with reference to the individuals composing the community, or who may be affected thereby, that these objects are sought.

The right to procure a supply of water for public use has been held to exist in a municipality as implied from the police power and for the preservation of health; and that such supply of water may be procured by contract as a sanitary and police regulation.

> "A city having power to pass ordinances respecting the police of the place, and to preserve health, is authorized, as a sanitary and police regulation, to contract to procure a supply of water by boring an artesian well, or otherwise, on the square, and is the judge of the mode best adapted to accomplish the object."
>
> 1 Dillon on Mun. Cor. (3d Ed.), Sec. 146, citing *Livingston* v. *Pippin*, 31 Ala., 542; *Indianapolis* v. *Indianapolis Gas Co.*, 66 Ind., 396, approving text; *Rome* v. *Cabot*, 28 Ga., 50; *Hale* v. *Houghton*, 8 Mich., 458.

> "To the extent necessary to execute the special powers and functions with which it is endowed by its charter, there is, indeed, an implied or incidental authority to contract obligations and to sue and be sued in the corporate name." Do., Sec. 443.

In Illinois, not less than elsewhere, the necessity of an adequate supply of water to municipalities to promote public safety, health, decency and comfort, has been recognized. The Illinois statutes cited (ante, p. 16) provide, Sec. 1:

> "That in all cities, incorporated towns and villages where water works have been or may hereafter be constructed by any person or incorporated company, the city, town or village authorities in such

cities, incorporated towns and villages may contract with such person or incorporated company for a supply of water for public use for a period not exceeding thirty years."

Sec. 2. "Any such city or village so contracting may levy and collect a tax on all taxable property within such city or village, to pay for the water so supplied."

Chap. 24, Art. X, Sec. 1, Ill. R. S., provides that:

"The city council or board of trustees shall have the power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or water works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; and also to prevent the unnecessary waste of water; to prevent the pollution of the water and injuries to such wells, pumps, cisterns, reservoirs or water works."

These two acts are *in pari materia* and should be construed together.

We have already noted the language of the legislature in the act of April 22, 1871, which refers to municipalities which "have established water works for the supply of water to the inhabitants thereof" (ante, p. 17). Notwithstanding the different verbiage, all these acts refer to exactly the same thing.

The supply of pure, wholesome water to the inhabitants of a city is a public purpose and a public use.

We contend that what the municipality was and is empowered by law to do is to provide a supply of water for the use of its inhabitants, either directly through its own

system of water works or, at its option, indirectly by contract with a person or corporation, and that the price to be paid by the inhabitants who desire to become consumers of water thus provided stands on just the same footing and is equally within the power of the municipality, *and for the same reasons*, as the price to be paid for so-called hydrant rental by the municipality itself.

The entire supply of water which cities can be legally authorized to provide must be of a public nature.

The supply of water to each of the inhabitants of the city for private and individual use is a public supply and a public use in the fullest and most ample sense. Indeed, such purposes as fire protection, the flushing of sewers, washing streets, and the like, to which uses hydrants are devoted and which provide the basis upon which all payments by the municipality rest, seldom involve a tithe of the general interest directly embraced in the domestic supply of water to each inhabitant for private and individual use.

"Private" means in its origin, separate, apart; concerning an individual only. "Public" refers to all the people, although it is applied to any sufficiently large fraction.

There is a great deal of misapprehension from which courts have not at all times been exempt in regard to the meaning of public as compared or contrasted with private interests and purposes. The impression quite commonly prevails that the one is narrow and selfish, if not even debasing; while the other is correspondingly lofty and ennobling. A very little analysis, however, will suffice to demonstrate that every so-called public interest, use or purpose which involves material considerations is strictly

private, personal and selfish with each individual affected. To this there is no exception, and from it there is no escape. When all is done and said it merely becomes a question of the greatest good to the greatest number in regard to interests equally private, personal and selfish, whether those of a consumer of water who pays or of a stockholder in the water company who receives the price or rate for water. Each may become the victim of oppression in regard to such interest. The real and only difference in all such cases where material interests are involved consists in the number of individuals whose interests are affected, and not in any diversity in the kind of interest; for it makes no difference in this respect whether water or bread is the article sold, and buyer and seller are alike moved by self interest.

Our claim is, therefore, that so far as the nature of the enactment or the power of the city are concerned, there is no difference between the hydrant rate and the rate to consumers provided for in different sections of these ordinances

The village had the right to decide whether it would supply water by means of a contract.

Had the Village of Rogers Park not been disabled by lack of means to raise the necessary money, it had the power to establish, erect and operate municipal water works. As we have already seen, this right was directly and explicitly conferred by statute. In that case its right to prescribe the rates at which water must be paid for by its inhabitants is unquestioned.

It is admitted by these pleadings that the village lacked the means to supply water directly. Had the action of

the municipality been dictated solely by its views of expediency, however, it would not change the principle for which we contend. The policy adopted by the village in determining to provide a water supply by private contract was one upon which its discretion and action must be uncontrolled and final.

1 Dillon Mun. Corp. (3rd Ed.), Sec. 94.

The power of the legislature of the state had been delegated to the municipality, and within the limits of the statute the power of the village to make a contract and fix rates for water was just the same as that originally possessed by the legislature itself.

Under the constitution of 1870 the entire legislative power to provide water for the use of municipalities and their inhabitants had been conferred in Illinois, by statute, on the municipalities themselves. This is in accordance with the wise and settled policy of local self-government, which has prevailed in this state from the beginning, and that such is the case plainly appears from the language of the acts.

Had a municipal plant been erected, the right of the village to fix rates for water to be collected from private consumers is not questioned. Had the village chosen so to do, it might have provided for a supply of water, to be paid for by itself, in any form which might be agreed upon, as, for instance, by meter rates, and it, in turn, could have collected the water rates which it prescribed from the individual consumers. Instead of doing this, it provided that the grantee under the ordinance should collect directly from the individuals who became consumers of water to be supplied by the contemplated water sys-

tem. The right to fix the rates to be paid by individual consumers of water as a part of the contract by which a water supply is obtained through water works erected under such contract by private persons seems to us to be equally clear with the right of the village to fix such rates, had it chosen to make the collections itself.

Good faith requires that the contract be kept.

The ordinance of November 12, 1888, was, in form and upon its face, an agreement and contract with the grantee therein named to erect water works and provide a supply of water for the village and its inhabitants. Prior to its acceptance by such grantee, however, it was in fact a mere proposition for a contract made by the village to him, which he was entirely free to reject. Sixty days was given to him by the terms of the ordinance to consider whether he would accept it or not, and the pleadings show that this time was given to him for the express purpose of enabling him to ascertain whether the terms of the ordinance, and the payments for water therein provided for, were sufficiently favorable to induce the investment of money in the erection and operation of the proposed water works. The village board of trustees passed the ordinance and sent the grantee out with it to try to obtain the necessary capital upon the faith of the rates for water therein fixed and prescribed.

The payments for water comprise the only inducement to invest the large amount of capital required for the contemplated water system, and it was solely upon the faith of the ordinance fixing the rates for payment therein prescribed that the grantee was able to obtain the money necessary for that purpose. Having done this, he ac-

cepted the ordinance and it became a binding contract enforceable by either party to it. The village could compel Keeler to cause the water works to be constructed and operated as prescribed in the ordinance, and Keeler on his part had the right, upon performance by him, to compel the village to carry out what it had thus contracted to do, when the water works in question had been constructed and were put in operation by the grantee and his assigns. What element was lacking to make a complete contract fully performed on the part of the grantee in the ordinance?

There is no constitutional prohibiton.

An attempt has heretofore been made to invoke the provisions of the constitutition of the State of Illinois which prohibits an irrevocable grant of special privileges by the legislature to cut down the provisions of the ordinance of November 12, 1888, which fixed the rates to be charged and paid for water during the ordinance period of thirty years.

The Bill of Rights, Art. II, Ill. Const. of 1870, provides in section 14 as follows:

> "No *ex post facto* law or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed."

The claim is made that the attempt to fix rates to be paid by private consumers for water for the period of thirty years, or for any other period, is within the prohibition of the words "any irrevocable grant of special privileges."

The first answer to this contention is found in the fact that no such construction has ever been given to the

language in question, although the constitution containing it has been in force for a generation.

The second answer is that the meaning contended for proves too much. It would be equally applicable to any grant or contract whatever, and this could never have been the true intent of the constitution. Such a prohibition would equally apply to the right to operate water works, or to continue the supply of water, or even to retain the mains in the streets for any definite period of time whatever. All rights would then be subject to immediate revocation. We respectfully submit that such a meaning was never seriously considered. It would prove far too precarious a basis for an investment of capital in costly and permanent improvements, the construction of which was of vital necessity to the village and its inhabitants, which it was unable otherwise to procure and which improvements are of little or no value for removal.

The grant was not irrevocable within the meaning of the constitution.

We insist that the grant is subject to three important qualifications which prevent it from being irrevocable within the meaning of any prohibition contained in the constitution.

First. The rights of the grantee could be terminated at any time by condemnation proceedings and the ascertainment of the fair value of the property by any court of competent jurisdiction. By these means, whenever the municipality was able to pay for the property it was entitled to purchase it, and it had the right under the law to operate the water system immediately upon such purchase.

Second. The option by the village to purchase said works was set forth in the title to the ordinance and appears in section 8. The village was given the right to purchase said system of water works at the end of the first ten years, and of each succeeding five years thereafter at an appraised valuation to be fixed by three arbitrators to be chosen as provided in said section.

Third. At the end of the thirty years comprised in the ordinance period, the water works must be removed or the property must be abandoned, for all contract rights then expire by limitation and cease.

It would be scarcely better than a confidence game practiced by the municipality if, after so great a lapse of time by a new and violent interpretation of the constitution, it should practically confiscate all property employed in public or quasi-public use.

The reservation in the statute on corporations does not apply.

A further claim has been advanced by defendant in error in this case in opposition to the rights of plaintiff in error, but for the reasons hereinafter stated we do not think the claim can be sustained. It has been insisted that the plaintiff in error is subject to any statute which the legislature of Illinois may at any time deem advisable to adopt, based on the reservation contained in chapter 32, section 9, under which act the plaintiff in error was incorporated. That section, omitting the proviso, which does not bear upon the questions here involved, is as follows:

> "The General Assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and pro-

visions shall be binding on any and all corporations formed under the provisions of this act."

1 S. & C. R. S., 2nd Ed., p. 1006.

Defendant in error contends that, under this provision, the right was reserved to reduce the rates for water which might be charged by plaintiff in error, and that the act of the Illinois legislature of 1891, cited ante (p. 17), provides a sufficient foundation and legal basis for the ordinance of the City of Chicago of October 4, 1897 ante (p. 18), reducing those rates.

In *City of Danville* v. *Danville Water Co.*, 178 Ill., 299, 306, some weight seems to have been given to this point, and similar language is repeated in the case now on hearing by the Supreme Court of Illinois in *Rogers Park Water Co.* v. *Fergus*, 178 Ill., 571, 576-7.

We think it will only be necessary to call the attention of the court to the facts in this case to dispose of the objection. The grantee under the ordinance of November 12, 1888, was a natural person, and said ordinance was accepted by him. Said Rogers Park Water Company, the plaintiff in error herein, was not then organized and had no corporate existence whatever. The only relations which exist, or which have ever existed between said corporation and the Village of Rogers Park, or the City of Chicago, are those which arise out of the assignment by said grantee to the plaintiff in error of his rights as such grantee under said ordinance. That acceptance was made January 9, 1889, which was the date of the acknowledgment, the acceptance being dated the previous day. When it was accepted the ordinance first took effect. Until then it had remained a proposition merely. Upon acceptance it became completely effective and enforceable.

The plaintiff in error occupies the same footing as Keeler, the grantee, in whose shoes it stands.

The corporation owed no duty to discharge any function whatever until it assumed compliance with the ordinance in question, and this duty devolved upon it because it became assignee of the grantee under that ordinance. Its charter, as such, had merely given it the right to exist, and had created in it the capacity to become such assignee; but that charter gave it no power to enter upon such business save under the ordinance.

The measure of the duty of the plaintiff in error in regard to all the questions which arise upon this record must be found in the ordinance of November 12, 1888, which it voluntarily assumed after said ordinance had been accepted by the grantee, and the legal consequences which result from such assumption, and not elsewhere, as it seems to us.

We respectfully ask the court how and why any different measure of right, privilege or liability can exist in regard to the plaintiff in error, so far as concerns all ordinance questions, from what would have been the case had the grantee, Keeler, pursued his legal rights as grantee under the same ordinance, and remained the sole possessor of the rights and privileges thereby conferred?

To hold otherwise would be to deny to plaintiff in error the equal protection of the laws granted by section 1, article XIV, of the constitution of the United States.

Honesty is the best policy for municipalities as well as for individuals.

The practical value of honest dealings between the people acting through their governmental agencies and those to whom application is made for the construction and operation of public utilities ought not to be overlooked. To-day, in Illinois, owing to the decisions which have been rendered in the *Danville* and *Rogers Park Water Company* cases, paralysis has fallen upon the erection of water works by private capital to supply municipalities and their inhabitants with water. No matter what may be the necessities of the people nor how great their willingness to give guaranties of reasonable and adequate returns, no capital can be induced to invest in so precarious a venture. The people have been disabled to make a binding contract, and none dare deal with them.

So far as this relates to water works erected since the act of 1891, and the construction of that act with reference to such works, we may dismiss it as a matter with which we have nothing to do; but when practical repudiation is attempted by decisions which in effect make that statute retroactive in character and all municipal obligations are weakened and all municipal credit is shaken in consequence, we may well call a halt and ask to revert to the old maxim which teaches that "honesty is the best policy" after all.

The reservation contained in the statute on corporations does not apply.

But even if the plaintiff in error had been named as grantee in the ordinance, we fail to perceive why it could not and would not have stood in exactly the same position

as a natural person in the same circumstances. In other words, we contend that any discussion of the reservation contained in Ch. 32, Sec. 9, Ill. R. S., is quite beside the question here involved, which has to do solely with the provisions of the ordinance granting the right to erect and operate the water works therein named and the power of the municipality so to contract.

As above stated, the entire legislative power to provide water for the use of municipalities and their inhabitants has been conferred by statute on the municipalities themselves.

Corporate capacity alone is conferred by incorporation under the general statutes of the state, while the grant of the franchise to erect and operate water works, including the right to lay mains in the streets, must be conferred by the municipality itself through appropriate ordinances. We fail to see how the construction of the statute is at all involved in this case.

The case does not involve the appropriation of water.

It will not be requisite for us to do more to distinguish the case at bar from those which have to deal with an appropriation of water from a source of limited supply than merely to say that here the source of supply contemplated was Lake Michigan, upon which the Village of Rogers Park fronted, and which provided an unlimited amount of water.

Principles relating to the use which may properly be made of a limited amount of water, the appropriation of which must give rise to a monopoly in an article necessary to life and restrictions imposed for that reason manifestly have no application here. This discriminates

7441

a large proportion of all the decisions which have arisen in the arid regions of the United States, including California, where the rainfall in large tracts is generally insufficient and the conservation of water becomes a matter of prime importance.

We believe that this court is too familiar with its own decisions to make it necessary to extend this brief by quotations from the cases cited which seem to us to be decisive of this case.

It seems to us that the decision of the Supreme Court of Illinois from which this writ of error has been prosecuted is destructive in its character and manifestly erroneous and that it ought to be reversed.

Respectfully submitted.

NEWTON A. PARTRIDGE,
Attorney for Plaintiff in Error.

Office Supreme Court U.S.
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Clerk

No. 56.
Sup. Ct. Brf. of Partridge for P. E.

Filed Oct. 31, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 56.

THE ROGERS PARK WATER COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN B. FERGUS, DEFENDANT IN ERROR.

IN ERROR TO SUPREME COURT OF ILLINOIS.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

NEWTON A. PARTRIDGE,
Attorney for Plaintiff in Error.

(17,407.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-31-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

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THE ROGERS PARK WATER COMPANY, PLAINTIFF IN ERROR,

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IN ERROR TO SUPREME COURT OF ILLINOIS.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

We avail ourselves of the opportunity given by the rules of this court to note some points in reply to arguments advanced and positions assumed by counsel for defendant in error, and to cite some additional authorities, and especially some late cases which seem to us to be of weight and to add something to the positions assumed by us in this case.

The suggestion appears (p. 11, Brief of Defendant in Error) that this court must first determine whether the case presents, besides the Federal question which it is explicitly stated in the same brief does exist in this case, any other matter or issue sufficiently broad to maintain the judgment of the court below; and, if so, the judgment must be affirmed. The same brief, page 9, states the issues to have been six in number, and these were (1) size of building, (2) that the ordinance under which we claim was not passed by the village of Rogers Park; (3) that there was no assignment by Keeler to plaintiff in error of his rights under the ordinance; (4) that no contract ever existed by virtue of said ordinance; (5) that the rates tendered complied with the subsequent ordinance of 1897; (6) that plaintiff in error did not fix rates by any rule or regulation.

Of these the first, second, third, fifth, and sixth came on for trial before the court and a jury. The fourth tendered an issue of law as to whether what was done amounted to a contract, and this, of course, was not submitted to the jury. Upon the first issue no evidence was introduced by plaintiff in error, and defendant in error proved the allegation in his petition. On the second the plaintiff in error made a good *prima facie* case, but some evidence tending to contradict the case of plaintiff in error was introduced by defendant in error. The court instructed the jury to find for defendant in error. The effect of this ruling was to decide that the ordinance of the village of Rogers Park, under which the works were built, could not in any event weigh against the later ordinance of the city of Chicago, prescribing different and lower rates for water than those contained in the former ordinance. It is

thus clear that no issue of fact arose upon this point, for the court decided the whole matter as an issue of law, and this was affirmed in the supreme court of Illinois (Rec., p. 101). The third issue was fully proved by plaintiff in error, and no proof was introduced on this point by defendant in error.

The fifth issue was proved by defendant in error, and the sixth issue was proved by plaintiff in error by the introduction of the ordinance of the village of Rogers Park, which prescribed the rates which plaintiff in error demanded. Sec. 12: "The said grantee or assigns shall charge the following rates" (Rec., p. 50). Then it was that the trial court refused all the instructions requested by the plaintiff in error and instructed the jury to find for defendant in error.

This was no more than to reaffirm the rulings already made by the same court in deciding the demurrers which had come before it, and no issues appear in this case upon which the decision of the supreme court of Illinois can rest outside of the Federal questions involved: That the ordinance of the village of Rogers Park could not in any event and did not after its acceptance by plaintiff in error constitute a contract with reference to the rates for water to private consumers which might be collected by plaintiff in error during the ordinance period of 30 years, and that a subsequent ordinance fixing a different and lower schedule of such rates, passed without the consent of plaintiff in error and never accepted by it, did not, therefore, impair the obligation of a contract, nor take without due process of law the property of plaintiff in error. These rights having been specially set up and claimed by plaintiff in error below, as appears upon the record, and the decision of the supreme

court of Illinois having been adverse to such claim, this court takes jurisdiction.

No attempt has ever been made before to urge that, because plaintiff in error filed no points in writing, as provided in the practice act, chap. 110, sec. 57, Starr & Curt., R. S. Ill., therefore it could not assign error upon the denial of its motion for a new trial. The supreme court of Illinois has uniformly held that, unless objection is made, such statement will be treated as waived, and that the want of it cannot be first urged in an appellate tribunal. This record shows no such objection, and it can have no standing here, where it is mentioned for the first time (Bromley *vs.* People, 150 Ills., 297, 299.)

The argument to the effect that no special contract was shown to exist between the parties, contained in brief for defendant in error, pages 22–25, need not detain the court. Like the argument as to whether or not there was reversible error in the rulings of the trial court in the giving and refusal of instructions and upon various matters of practice in mandamus cases, argued in said brief, pages 20, 21, these questions are not before this court for determination. Their only office here would be to befog the issue, unless, as we infer alike from the statement of counsel and the identity of matter, the argument to the supreme court of Illinois, where these questions were pertinent, has been reprinted here, where they do not apply (Brief, p. 12; "The same sequence of points will be made in this argument as was made in the supreme court of Illinois.") It is hardly necessary for us to say that the issues here are much narrowed, and it does not devolve upon this court to traverse

all the ground covered by the supreme court of Illinois merely because that court was forced to do so.

The case before the court does not depend upon any claim of monopoly or exclusive right or privilege. That question does not arise in this case, and decisions like Jackson Co. Horse R'y Co. *vs.* Interstate Rapid Tr. Co., 20 Fed. Rep., 306, which are cited to show the rule as to exclusive privileges, should be closely scrutinized and not extended beyond the reason for the rule announced, which reason was that one who claimed an exclusive privilege claimed something in apparent conflict with equality of right, and the rule is stated to be that the claimant must therefore show clear warrant of title and probably corresponding benefit to the public. We do not seek to deny or evade the rule that we must show the grant under which we claim; but that fully appears in the statutes of Illinois printed in our brief, pages 15–18, and the ordinance herein of the village of Rogers Park, as set out in the answer, to which the demurrer was sustained (Rec., pp. 44–52).

The position of defendant in error, as it is stated by him (Brief, pp. 39–47), seems to be that because the transaction is purely legislative, and not at all a contract, as he asserts, therefore the rate to be charged for service rendered by the grantee must always be open to review and to change from time to time and at all times. Upon this point he is specific and has placed himself squarely and unequivocally before the court.

It is true he seeks for support in supposed constitutional limitations and supposed legislative defects; but in order to substantiate the existence of such limitations and defects he

falls back upon constructions which in turn rest on this very chain of reasoning.

The three Illinois decisions cited do not support his claim in the form in which it is urged in this case.

The case of Carlyle *vs.* Carlyle Water, etc., Co., 52 Ill. App., 577, arose before the statute of 1891, and all the court there said upon the subject was only *obiter dicta*.

In the gas case of City of East St. Louis *vs.* East St. Louis Gas, etc., Co., 98 Ill., 415, the city was under a private charter and it had exercised an implied power in making the gas contract, so far as the term was concerned, at least, but the judgment for the amount claimed by the gas company was affirmed. The separate opinion of Mr. Justice Walker, who assented to the decision of the court, is not to be considered as the opinion and decision of the court, in any possible view of the case. We contend that it was only by means of the ordinance provisions which, when accepted and acted upon as therein provided, became a contract, as we claim in the case at bar, the village of Rogers Park was enabled to procure a supply of wholesome water for the use of the village and its inhabitants; and these reasons do not apply with anything like the same force to the case of a gas company already in operation for many years and already supplying gas to the city and its inhabitants under an old charter.

In Milliken *vs.* County of Edgar, 142 Ill., 528, the court had to deal with a political division created for governmental purposes and without general municipal powers. What the court there decided was that the contract under which Milliken claimed, and which purported to employ him for three years as keeper of the county

poor-house at a stated annual salary, while the board of supervisors which employed him only held office for one year, exceeded the power of the board, and therefore afforded no basis for a suit for damages when he was discharged by a subsequent board. The court comment on the nature of his duties and follow former decisions with reference to the employment of school teachers for terms extending substantially beyond the existence of the official term of the school directors who employed them. These cases are not analogous to the one at bar.

The nature of the position assumed by defendant in error seems to be that all the courts and all the lawyers have been quite astray and have reasoned from false premises to a faulty conclusion in all the cases from *Munn vs. Illinois*, 94 U. S., 113, although some of them have been correctly decided. (Brief, pp. 39, 40). He holds that it is not possible for the legislature to have any right definitely to fix the price of a service rendered to the public for any period of time, no matter how brief. On his theory this must apply equally, whether the service be rendered directly by the municipality which owns and operates the public-service plant, be its nature what it may, or whether the municipality has adopted the expedient of granting the right to some individual, firm, or corporation to install and operate such a plant, and thus to provide the given service to the public. If the right to fix the rate exists in one class of cases, so must it in the other.

The proposition is that where the public or any individual may demand the performance of a service as a legal right, whoever receives the service cannot be compelled to pay more than what a court of competent jurisdiction will de-

cide to be a reasonable price therefor at the time the service is rendered. "No legislature nor any sovereign can deprive them of this right," which is asserted to be inherent and inalienable and a self-evident truth.

Let us see. While it is possible that all the decisions are awry, it is also possible that counsel is in error. The rates to be charged by municipalities for services rendered directly by them are in the last analysis governed largely and in some important cases entirely by the views of public policy held by the State or the community. Public schools provide a familiar and important class of public services rendered for less than cost, and sometimes even quite free of cost, to those who receive them. Public libraries are often found conducted on the same plan by municipalities. Even in the case of water supply similar principles have been adopted, and much water is now supplied by Chicago, for instance, through the city water works, built, maintained, and operated by the city, for which no charge is made to those who use the water. This is done for the reason it was deemed expedient to encourage the increased use of water as a sanitary measure. On the other hand, whether water works, gas works, street railways, etc., when owned and operated by the public, shall be made to produce a revenue to go in reduction of taxation, or whether only such rate shall be charged as will maintain and operate them with due allowance for a return on the investment, or at some other rate, are questions of policy to be determined by the proper authority representing the public. We feel sure that courts will hesitate to assume the function of deciding such questions. These have always been held to devolve on the legislative branch of government, and there they must rest, in our view, unvexed by suits by those who

have paid the properly established rate for such service, and who, in the guise of a suit to recover back an excess which they claim such rates to embody, now seek to have the court decide what policy the municipality ought to adopt. To this must we come, and at once, if the position of counsel is sound and to be adopted by this court. Equally unsound is the position assumed that where an ordinance has been accepted which prescribes rates for service the grantee may appeal to the courts to permit a different and higher rate to be charged. The danger apprehended by counsel we do not dread as being any worse in this respect than with reference to many other subjects about which contracts are freely made without any power to revise them at the request of either party. Risk is an element in business, and hence in all business contracts. While the time is generally longer in public-service contracts, the fluctuations are much less violent than those ordinarily incident to other business. Of course, water works and street railways and gas and electric light plants have been started in many places as speculative ventures which have failed; and this must go on to the end of the chapter, while human nature remains the same. Other kinds of business have failed, too, under similar conditions. Some of these investments have proved largely profitable, but not more so than many other kinds of investment in the same places, with the general prosperity of which, indeed, their own is closely knit. Shall this element of uncertainty which inheres in all business be deemed a sufficient ground for judicial interference?

When we place the right to fix rates for such period as the legislature may determine to be reasonable, and on such a a schedule as the municipality may decide, upon the ground

that this is the exercise of an authority by the municipality which is incident to its right to contract and is not in any just sense an exercise of legislative power, we place it on its true basis and avoid all the real objections which counsel has conjured up.

Counsel asserts that the legislature itself had no power, and that the municipality had no power to establish a schedule of water rates to be paid by private consumers during any specified period. In the language of the assertion (Brief, pp. 15, 39), where it is made a principal heading of the brief, and again in the argument, this statement applies equally to municipal water works and to those erected and operated by others. We have already tried to show the unsoundness of the assertion and of the reasoning of counsel with reference to municipal water and like works, and we contend the claim is equally fallacious when urged with reference to a case like the one before the court.

The case of Smyth *vs.* Ames, 169 U. S., 466, is one of subsequent legislation intended to curb a corporation with which no contract exists, but upon which a duty devolves. In fixing the limits of such legislative power, this court dealt, as we apprehend, with the facts before it and did not seek to lay down any rule which would govern totally unlike cases by its decision therein. We submit that any variation which might be found to exist in the facts provable in cases like Smyth *vs.* Ames, growing out of differing circumstances which might occur at different times, affords no light upon the questions before this court in the case at bar.

We have already cited a few cases which seem to us to

lay down the true rule herein. We contend that the legislature had the right, and that it gave the municipality the right, to fix the schedule of rates to be paid by private consumers who should take water from the company during the ordinance period of thirty years.

The statute speaks for itself, and on ordinary rules of grammatical construction, we submit, cannot be cut down after the fact, as has been attempted by the supreme court of Illinois in these water cases, and counsel adds nothing to those decisions.

We have already cited Ill. Trust & S. Bank *vs.* Arkansas City, 76 Fed. Rep., 271. In that case the court used pertinent language applicable to more than one feature of the one on hearing. With reference to the claim that the ordinance gave a grant of an exclusive character on its face, and that this was void, the court (p. 281) said in effect, as we say here, that this feature is not involved.

With reference to the right to fix the rate for hydrant rentals for 21 years, the court held squarely that the right existed, not as a legislative, but as a contractual power, exercised as a business or proprietary right to obtain a private benefit for the city and its denizens. The reasons set up by us in the answer, to which the demurrer was erroneously sustained, as we contend, and which set out the inability of the village otherwise to secure the water supply which the health and comfort of its inhabitants required, were here considered by the court, and the only way to obtain the investment of the requisite capital which we alleged, the court assumed in that case, where it was said that fixed rates for a definite and suf-

ficient length of time provide the only basis upon which such investment can be had.

Atlantic City Water Works Co. *vs.* Atlantic City, 48 N. J. L., 378, is a case decided in 1886, where it was held that a fixed hydrant rental during the time the company should comply with its obligations under a contract made to obtain a supply of water by the city, the charter of which empowered it to provide by ordinance "for a supply of water for said city," was good.

The Los Angeles City Water Company has invoked the aid of this court so recently that we need take no more of its attention than to say the questions related to fixing rates for water to be paid by private consumers at a less rate by the ordinance of 1897 than that provided by the contract of 1868.

Los Angeles *vs.* Los Angeles City Water Co., 177 U. S., 558; 88 Fed. Rep., 720, S. C.

Still another attack on the same company by the city of Los Angeles has resulted in another bill to annul an ordinance passed February 26, 1900, which purported to establish reduced rates at which the water company should supply private consumers. This case is reported in 103 Fed. Rep., 711, and at page 734 the court said:

"It is a self-evident proposition that it takes at least two parties to make a contract, and it is equally plain that as long as it exists at all, all parties are bound by its provisions."

In Fergus Falls Water Co. *vs.* City of Fergus Falls, 65 Fed. Rep., 586, 591, the court adverts to the fact, which exists in our case, that 10 years of the 30 years of the ordi-

nance period have elapsed, and that the city at its option can buy the works at a fair price, so that the exclusive feature has expired. In our case the price is to be fixed by three skilled, disinterested arbitrators (Rec., p. 49, sec. 8).

In Maine Water Co. *vs.* City of Waterville, 93 Me., 586, decided in 1900, the term was twenty years.

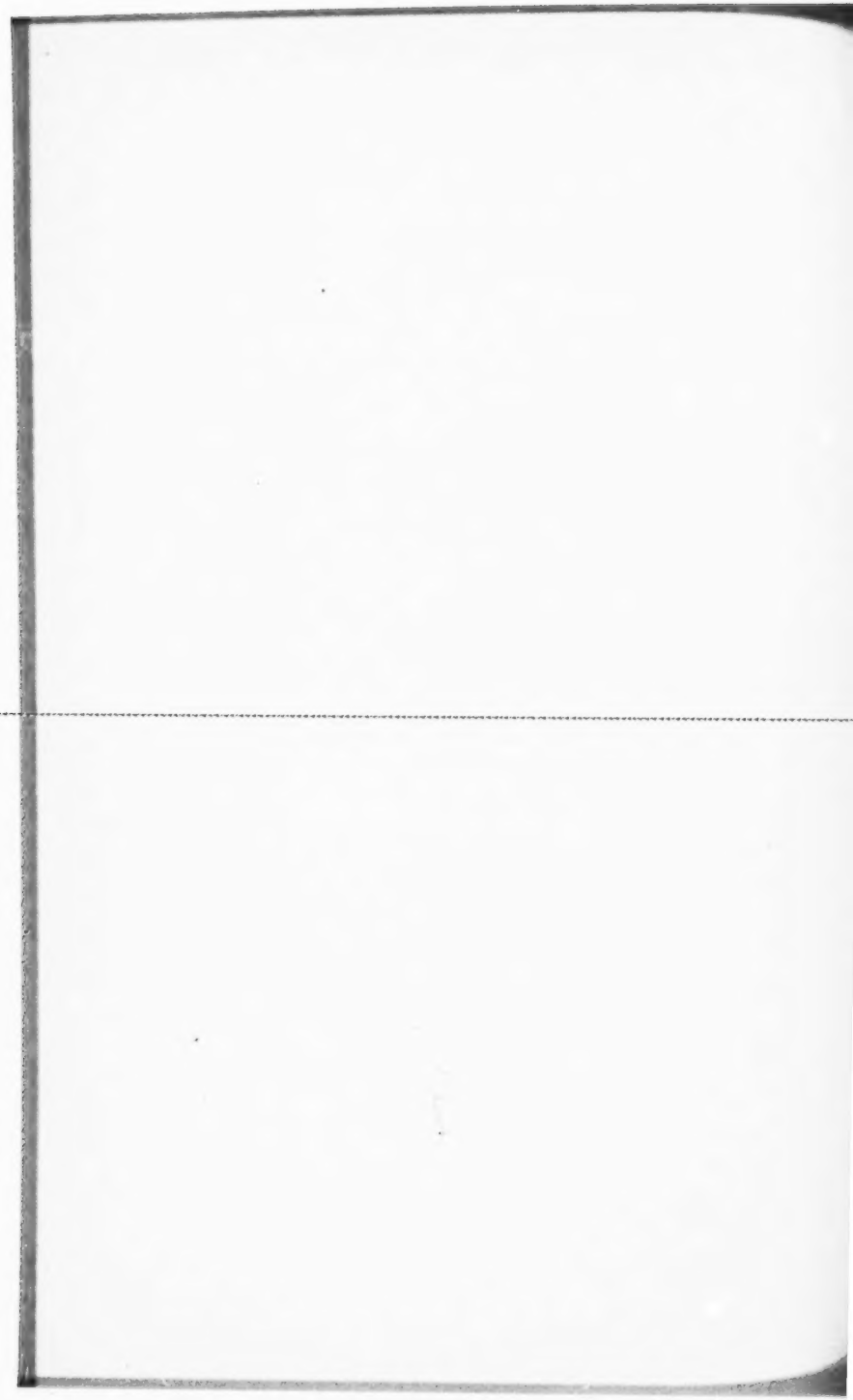
The court say, page 601:

"In many cases it is absolutely necessary for a city or town to make a water contract for a term of years in order to obtain the great benefits of a water supply," which is essential to the safety and health of its citizens. "Without a contract extending over a period of years it would, we believe, frequently be the case that no individuals or corporations could be found who would go to the expense of constructing a suitable and sufficient water plant that would answer the requirements for public purposes as well as for domestic uses."

Many other decisions might be cited which embody the principles for which we contend, and which cases seem to us to be based on sound reasoning, and to be far safer and more satisfactory than the rule for which counsel for defendant in error contends. In view, however, of the very exhaustive brief and argument filed on behalf of plaintiff in error in the Freeport case, No. 348, which has been submitted in connection with this case, we believe it is not requisite that we add anything further.

Respectfully submitted.

NEWTON A. PARTRIDGE,
Attorney for Plaintiff in Error.



OFFICE SUPREME COURT
RECEIVED
MAY 13 1901

No. 56.

Petition for Rehearing

Term No. 56. Gen. No. 17,407.

Rec'd & Dist'd May 13, 19

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE ROGERS PARK WATER COMPANY, *Plaintiff in Error,* vs. **JOHN B. FERGUS,** *Defendant in Error.*	In Error to Supreme Court of Illinois.

Petition for Rehearing of Plaintiff in Error.

NEWTON A. PARTRIDGE,
ATTORNEY FOR PLAINTIFF IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

THE ROGERS PARK WATER COMPANY, *Plaintiff in Error,*	In Error to Supreme Court of Illinois.
vs.	
JOHN B. FERGUS, *Defendant in Error.*	

PETITION FOR REHEARING.

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the plaintiff in error in the above entitled cause, respectfully prays for an order directing a rehearing by the court of said cause on the following grounds:

1. The court seems to have given undue weight and authority to the decision of the Illinois Supreme Court in the case of *Danville Water Co.* v. *City of Danville*, 178 Ill., 229, as announcing a well-settled rule of construction of the statutes of Illinois referred to in the decision herein, when in fact the said case did not announce such construction of any of said statutes. Every decision of said court involving the construction now given to said statutes by said court which was a final decision in the

sense that a writ of error would lie thereon has been brought to this court for review.

2. The court appears to have held that the fixing of rates to be paid for water to be supplied to the inhabitants of a municipality by private water works constructed under a franchise so to do granted by the municipality involves the exercise of governmental functions; although all the provisions for the erection, maintenance and operation of such works, by which the burden of so doing is assumed by the grantee of such franchise, are held to involve contractual relations only; and although such rates are fixed in and by the same ordinance which provides for the construction, maintenance and operation of such works.

3. The decision of the court holds, in effect, that all the burdens and expenses incident to the construction, maintenance and operation of the system of water works of plaintiff in error during, and until the end of, the period of thirty years for which the franchise was granted by the ordinance of 1888 were voluntarily assumed as a matter of contract by the plaintiff in error, so that it is compelled during all of said time to operate said works and supply water to the defendant in error; while the sole consideration to it for said contract and for the burdens thereby assumed is held to be liable to be changed and reduced without the consent of the plaintiff in error upon whom the entire burden of the contract is cast. This has the effect of requiring by peremptory writ of mandamus the specific performance of said contract on the part of the plaintiff in error while it is deprived by the judgment of this court of the consideration which was the sole inducement to it to enter into and assume the contract obligations on its part to be borne.

4. The construction placed by this court on the words "to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance and for a period not to exceed thirty years" contained in the act of the Illinois legislature concerning cities, villages and towns, of April 10, 1872, does not accord with the usual and ordinary rules of grammatical meaning and construction of words and sentences, because the court holds the word "period" is not so connected with the words "at such rates as may be fixed by ordinance" as to permit the same term or period named to apply to rates so fixed during which such works must be maintained and operated by the grantee under such ordinance; while the ordinary rules of grammar do require such meaning to be given to said words. The word "and" which connects the two clauses of the sentence denotes that equal force is to be given to each member of the sentence, and that the limitation in time, viz.: "not to exceed thirty years," applies equally to the time during which the ordinance may provide the water works shall be maintained and operated and the time during which rates may be fixed by such ordinance if the usual, ordinary meaning of language shall be given to said words. There is nothing to show that said words were used in said act in any other than their usual and ordinary sense and meaning.

5. The act of 1891 is held by the court to give authority to the City of Chicago to pass the ordinance of October, 1897, reducing the rates which the plaintiff in error was authorized to charge to the inhabitants of said city for water supplied to them by plaintiff in error, while if such right existed at all it must have existed under the statutes prior to the passage of said act; and if it

did not so exist, said act of 1891 could confer no authority on said city to pass said ordinance because the water system of the plaintiff in error was erected and put in operation under said ordinance of 1888 and long prior to the passage of said act of 1891.

6. The decision herein seems partially to hold that section 9 of the general incorporation act of April 18, 1872, authorizes the ordinance of 1897 materially reducing the rates which plaintiff in error may lawfully charge for water supplied by it. No such construction had ever been placed on said act previous to the decisions in the water cases herein, and all final decisions of the state court so holding have been removed to this court for review; and such act ought not to apply in this case in any event because the grant was made to a natural person, assignor of the plaintiff in error, and accepted by him.

It is not consistent with the subsequent statutes cited by the court that the legislature intended or knew or supposed that different kinds of contracts could be made with individuals from those authorized to be made with corporations by municipalities. The amendment of 1885 is not compatible with any intention of the legislature to discriminate between individuals and corporations; and the act of 1891 would be meaningless under the construction given it by this court as applied to existing contracts with corporations.

7. The decision herein proceeds on the further assumption that the language of the ordinance of 1888 did not definitely fix the rates which plaintiff in error was thereby authorized to charge and collect for water during the entire period for which it became obliged to maintain and operate said water works. That period is fixed at thirty years by said ordinance; and by assignment from

the grantor, who had accepted its terms, the plaintiff in error, as this court has decided, has assumed the obligation to maintain and operate said water works and thus to supply water to the defendant in error during all the unexpired portion of said period. A peremptory writ of mandamus has been ordered to issue to compel the plaintiff in error to perform this obligation.

The two branches of said ordinance, in which one branch was the sole consideration for the other, should be construed in the same manner, the one being the correlative of the other and the only inducement to the acceptance thereof.

The ordinance was and could be no more than a proposition merely until it was accepted by the grantor. No reason exists why the giving of a monopoly of the supply of water, which was known not to be valid and enforceable except against the village as a rival or competitor, should be necessary to induce the investment of capital and for its security; while at the same time it should not be necessary to induce such investment to fix a rate or consideration which should be unalterable without the consent of the parties during the entire period throughout which those who invested the necessary capital were obliged to maintain and operate the water system and supply water to said village and its inhabitants. This, however, is what this court has decided herein.

Such an interpretation as it seems to us is not consistent with the intention of the parties nor with the import and significance of the language employed by them.

The rule of construction heretofore in force has been that the considerations to be given and received by each

of the parties to an agreement were equally a part of it and were to be construed together so that obligations and benefits should be mutual and equal so far as the binding force of such contract was concerned.

Your petitioner is aware that the matter has already been carefully considered by this honorable court, and that none but weighty considerations can furnish a justification for attempting to reopen a matter which has already consumed so much time and attention.

Principles of so much importance are involved in the decision of the case that we feel not only justified in presenting this petition, but that our duty demands we should do so.

As we understand the decision of the court in the above-entitled cause it must be taken in connection with the decisions rendered at the same time in the *Danville* case and the *Freeport* case, particularly the latter. These decisions seem to have turned upon the construction of the various acts of the Illinois legislature cited in the opinions and also of the particular ordinances under which the several water companies operated their respective water works.

If the establishment of rates to be charged by plaintiff in error does not properly fall within "governmental functions," as the term is used by the court in the decision herein, then the ground for the decision would fail; for it is only on the assumption that the contract for which we contend impairs the exercise of governmental functions by the municipal authorities that the contract is held liable to objection. The authorities in this court holding adversely to the position taken by the court herein seem to us both numerous and weighty.

The court in its opinion in the Freeport case has used the following language:

> "The fullness of sovereignty can be taken for granted, and naturally would be and should be taken for granted. An example is afforded by the act of June 6, 1891. By that act the corporate authorities of any city which have authorized or shall authorize any individual, company or corporation to supply water, 'be and are hereby empowered to prescribe by ordinance maximum rates and charges for supply of water furnished by such individual, company or corporation.'" * * * "There is no explicit provision for repetitions of the power—none declaring the power conferred a continuing one. Who now doubts that it is?"

We do not think it has been conceded herein that the power given to cities by that act is a continuing one and capable of repeated exercise. The act is at least capable of the construction that by its language the legislature intended to confer upon the municipality an explicit power to fix the rates to be charged by the grantee of the franchise for water supplied to private consumers, as distinguished from water supplied to the municipality.

No statute prior to 1891 included any specific reference to the supply of water by any other than the municipality to the inhabitants of municipalities; and it might well have been the case that doubts would arise as to the power of municipalities to fix rates for water to be paid by the inhabitants thereof to any other than the municipality itself. Indeed, such power has been disputed. It is only in the act of 1871 that the supply of water to the inhabitants is expressly named and there the reference is in connection with cities which have established municipal water works.

The caption of the act of 1891 for the first time names

the supply of water to the inhabitants of a municipality from other than municipal water works; and this is repeated in the body of the act, where the power is expressly conferred on the corporate authorities of municipalities to prescribe by ordinance maximum rates and charges for the supply of water thus furnished to the municipality and the inhabitants thereof.

This would make the statute rather of the nature of an enabling act, intended to cure a defect in the former statutes. The addition that such rates should be just and reasonable would not necessarily conflict with this construction. There are already enough cases, and these are increasing in number each year, where grants are expiring by limitation to make fully operative the last clause of the section providing for a review by the Circuit Court of unjust and unreasonable rates. In such cases of renewals or extended terms, the necessity of securing judicial review of rates, which, from the nature of the case, might be imposed by one party without the consent of the other, naturally arises and is clearly apparent. No such occasion would or could occur where the rate was fixed by agreement at the beginning of the term. This construction of the statutes had been acquiesced in for nearly twenty years. The words "time to time" seem to us to be consistent with rates fixed by ordinance for definite periods not extending beyond the statutory limit of thirty years. Of course we insist the power to fix rates was given by the acts of 1872.

"Doubt" cannot arise from the decision of the state court, but must arise from the independent judgment of this court.

The first final decision has been brought here. Only three final decisions have been reached, viz: *Rogers Park Water Co.* v. *Fergus*, 178 Ill., 571, decided February 17, 1899; *Danville Water Co.* v. *City of Danville*, 186 Ill., 326, decided June 21, 1900; and *Freeport Water Co.* v. *City of Freeport*, 186 Ill., 197, decided June 21, 1900. These cases have all been brought to this court for review.

The decisions rendered in *City of Danville* v. *Danville Water Co.*, reported in 178 Ill., 299, and *Same* v. *Same*, in 180 Ill., 235, resulted in reversals of judgments rendered in favor of the water company below, and both cases were remanded for further proceedings. Indeed, the Illinois Supreme Court, 186 Ill., 326, say:

> "Manifestly the only purpose of this appeal is to obtain a final judgment in this court to enable appellant to take a further appeal if it should desire to do so."
>
> Advance Sheets U. S. Supreme Court, Oct. Term, 1900, No. 12, 505, 508.

This completely disposes of all decisions as applicable to this case which depend on the doctrine of following rules of property established by a line of decisions, for no such line is here to be found. It is enough to say of the Carlyle case (52 Ill App., 577) that the decision did not involve any discussion of the question of public policy which the court indulged in; that the court is not a court of last resort in cases of this character; and that by the very statute creating the court it is expressly provided that its decisions in any case shall not be of binding authority in any other case. This destroys the weight as an authority of the Carlyle case.

The far-reaching effect of the decision at which this court has arrived can be seen in the movements already in full tide to regulate the rates of gas, electric, street railway, telephone, telegraph and other companies, all of which are assumed to be within the scope of the principles of construction adopted by the court. Numerous statutes and ordinances designed to affect some or all of such companies have already been introduced in the legislature of Illinois and the common councils of Chicago and other cities; and a general crusade for the purpose of reducing rates charged by all public utilities has been inaugurated all along the line. The subject, then, is evidently of the greatest importance, and we feel bound to do everything within our power to have the matter fully considered in all its bearings by this court before the decision finally passes beyond recall.

In submitting this petition we desire to refer to the more extended application made by the Freeport Water Company in the case of *Freeport Water Co.* v. *City of Freeport*, decided March 25, 1901, and we have sought to avoid burdening the court with any presentation of authorities or arguments not deemed by us necessary in order to make clear the exact nature of the grounds presented herein. Should a rehearing be granted by the court we shall endeavor to support these grounds by such authorities and arguments as seem to us to be pertinent.

Your petitioner prays that said cause may be set down for reargument according to the usual course and practice of this honorable court, and that such orders may be

entered herein as to law and justice may appertain and to this honorable court may seem fit and proper.

Respectfully submitted.

NEWTON A. PARTRIDGE,
Attorney and of Counsel for Plaintiff in Error.

I hereby certify that in my opinion the foregoing petition for rehearing is well founded.

Newton A. Partridge
Attorney and of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

ROGERS PARK WATER COMPANY,
Plaintiff in Error,

vs.

JOHN B. FERGUS,
Defendant in Error.

} ERROR TO SUPREME COURT OF ILLINOIS.

Brief and Argument for Defendant in Error.

A Federal question was argued in this case in the Supreme Court of Illinois. That question was as follows: If the Board of Trustees of the village of Rogers Park did, November 12, 1888, pass the ordinance shown on pages 71 to 79 of this Record, then did that ordinance, and the acceptance of the same, and the construction of water-works thereunder, constitute a contract giving to Keeler and his assign, the plaintiff in error, the right to collect, from private water-takers, the prices, charges or rates specified in the ordinance for a period of thirty years, the obligation of which was impaired by the ordinance passed October 18, 1897 (Rec. p.

67), by the City Council of the City of Chicago, after the annexation of Rogers Park to Chicago, establishing, as the maximum rates to be charged by the plaintiff in error to private water-takers, rates lower than those specified in the ordinance of November 12, 1888; and would an enforcement of the ordinance of October 18, 1897, take property of plaintiff in error without due process of law?

The village of Rogers Park and the city of Chicago were at the several dates mentioned, applicable to them respectively, incorporated under Chapter 24, Revised Statutes of the State of Illinois, and the several acts supplemental thereto and amendatory thereof, all of which statutes and acts were adopted and passed subsequent to the adoption of the Constitution of 1870, and therefore subject thereto.

Sec. 14, Art. 2, Const. 1870, is as follows: "No ex-post-facto law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed."

The only legislative authority under which the Board of Trustees of the village of Rogers Park could act in passing the ordinance, claimed to have been passed November 12, 1888, is Sec. 1, Art. 9, Chap. 24, Rev. Stat. Ills., which is as follows: "The "City Council or Board of Trustees shall have the "power to provide for a supply of water by the "boring and sinking of artesian wells, or by the "construction and regulation of wells, pumps, cis- "terns, reservoirs, or water-works, and to borrow "money therefor, and to authorize any person or

"private corporation to construct and maintain the "same at such rates as may be fixed by ordinance, "and for a period not exceeding thirty years. * * "

[Plaintiff in error did, however, contend in the court below that the Board of Trustees had power to pass the ordinance claimed to have been passed November 12, 1888, by virtue of an act of the General Assembly of the State of Illinois, in force July 1, 1885, entitled "An Act to enable cities, in- "corporated towns and villages to contract for a "supply of water for public use, and to levy and "collect a tax to pay for the water so supplied." That act is as follows (omitting the enacting clause): "Sec. 1.—That in all cities, incorporated "towns and villages where water-works have been "or may hereafter be constructed by any person "or incorporated company, the city, town or village "authorities in such cities, incorporated towns and "villages may contract with such person or incor- "porated company for a supply of water for public "use for a period not exceeding thirty years.

"Sec. 2.—Any such city or village so contracting "may levy and collect a tax on all taxable prop- "erty within such city or village, to pay for the "water so supplied."

This act clearly intends to provide for a supply of water for public use, as distinguished from private use, for it is apparent that no legislature could provide for the payment for water used by private individuals by a general tax on the taxable property of the municipality.

Sec. 13, Art. 14, Constitution of Illinois, 1870,

provides that "no act hereafter passed shall em-"brace more than one subject, and that shall be "expressed in the title." The title to this act is: "An Act to enable cities, incorporated towns and "villages to contract for a supply of water for pub-"lic use and to levy and collect a tax to pay for the "water so supplied," which clearly precludes any such application of it as to empower an incorporated village to fix water-rates for water supplied to private consumers.

This is mentioned parenthetically because, in argument in the courts below, plaintiff in error claimed that this act conferred on the village of Rogers Park the power to fix water-rates, to be unchangeable for a period of thirty years, and if its contention had any foundation the language used is much stronger and less equivocal than that used in the section of Chap. 24, R. S., before quoted.]

The only authority under which the City Council of the city of Chicago passed the ordinance of October 18, 1897, is an act of the General Assembly of the State of Illinois, in force July 1, 1891, in one section which is as follows: "That the corporate "authorities of any city, town or village, now or "hereafter incorporated under any general or "special law of this State, in which any individual, "company, or corporation has been, or hereafter "may be, authorized by such city, town or village "to supply water to such city, town or village and "the inhabitants thereof, be and are hereby em-"powered to prescribe by ordinance maximum

"rates and charges for the supply of water fur-
"nished by such individual, company or corpora-
"tion to such city, town or village and the inhabi-
"tants thereof, such rates and charges to be just
"and reasonable, and in case the corporate au-
"thorities of any such city, town or village shall
"fix unjust and unreasonable rates and charges,
"the same may be reviewed and determined by
"the Circuit Court of the county in which such
"city, town or village may be."

Plaintiff in error was incorporated under Chap. 32, Rev. Stat. Ills., adopted subsequent to the adoption of the Constitution of 1870, Sec. 9 of which chapter is as follows: "The General As-
"sembly shall, at all times, have power to prescribe
"such regulations and provisions as it may deem
"advisable, which regulations and provisions shall
"be binding on any and all corporations formed
"under the provisions of this act."

Such being the state of the law, defendant in error applied to plaintiff in error for water, tendering water-rates under the Chicago ordinance of 1897, which application was denied and defendant in error filed his petition for mandamus to compel plaintiff in error to furnish water (Rec. pp. 6-9), in which no mention was made of any ordinance of the village of Rogers Park. A demurrer to the petition (Rec. pp. 10,11) was overruled (Rec. p. 63), and plaintiff in error answered (Rec. pp. 12-25).

Subsequently, plaintiff in error filed its amended answer (Rec. pp. 30-56), dividing the same

into three parts, designating each part an answer. In the first it (1) admitted that defendant in error was the occupant of the premises described in the petition, but denied the dimensions and appliances contained therein as alleged; (2) admitted that the premises described in the petition were situated in Rogers Park, the annexation of the latter to Chicago, and that Rogers Park was and Chicago is a municipal corporation as alleged in the petition; (3) alleged that said village being desirous of obtaining a supply of water for public use passed an ordinance November 12, 1888 (setting out the same, Rec. pp. 30-37), giving to one Keeler and his assigns the exclusive right to construct, maintain, and operate a water-works system in said village for a period of thirty years and lay its pipes in the streets; Section 12 of which (Rec. p. 36) is as follows: "The said "grantee or assigns shall charge the following "annual water-rates to consumers of water during "the existence of this franchise," etc., which section included a "Tariff of Water Rates;" (4) admitted that it was a corporation organized and having the corporate purposes as alleged in the petition; (5) alleged that the ordinance of November 12, 1888, was assigned by Keeler to plaintiff in error; (6) admitted that in pursuance of the objects of its incorporation plaintiff in error did construct a water-system in Rogers Park, and alleges that the same was done by authority and in virtue of said ordinance, and that the same became and was a contract between plaintiff in

error and the village and city; (7) admitted that it had laid a water-pipe connected with its works in the street in front of the premises of defendant in error, to which were attached the appliances in said dwelling house; (8) admitted that on and before October 4, 1897, there was an ordinance in force in the city of Chicago fixing city water-rates as alleged in the petition, but denies under such rates those due on the dwelling of defendant in error were as alleged in the petition; (9) denied that on October 4, or any other time, the city of Chicago passed a valid ordinance fixing maximum rates to be charged by plaintiff in error and alleges if any such ordinance was passed it was illegal and void; (10) admitted tender by defendant in error and refusal of acceptance of same as alleged in the petition. In the second part or answer it (1) alleged that defendant in error on May 17, 1897, applied for water (application set out Rec. p. 41) whereby defendant in error contracted to pay the tariff rates set up in the ordinance for so long a time as he should desire to have a supply of water, and that by reason of his refusal to pay the same, and not otherwise, plaintiff in error had shut off his water. In third part or answer it (1) alleged that the village of Rogers Park being desirous of obtaining a supply of water for public use and being prohibited by law from raising the amount of money necessary therefor, passed an ordinance granting to Keeler the right to construct the same, and set out again the ordinance as in the first part or answer; that said

ordinance was passed to enable Keeler to negotiate with other persons, on the faith of the ordinance, to obtain necessary capital to construct; that Keeler did negotiate with other persons and on the faith of said ordinance plaintiff in error was incorporated and necessary funds raised by subscription to stock and sale of bonds and a water-works system was constructed; (2) that the ordinance and rights thereunder were assigned January 31, 1889, by Keeler to plaintiff in error; that plaintiff in error constructed the water-works system, which was accepted by the village, and from time to time extended under orders from the village and, after annexation, from the city; (3) that defendant in error had a well and pump of his own, and was provided with water from the same; (4) that the rates demanded of defendant in error were those prescribed in the ordinance; (5) that the ordinance with the acceptance and construction of the works thereunder constituted a contract.

To this answer defendant in error demurred in part and pleaded in part. He demurred generally to all of the third part of the answer (Rec. p. 57), and specially to those parts of the first part of the answer which alleged (1) (Rec. p. 56) that if the city did pass an ordinance and fixing maximum rates to be charged by plaintiff in error such ordinance was without authority and was illegal and void, and (2) (Rec. p. 57) which alleged that a contract existed between plaintiff and defendant in error, whereby the latter was obligated to pay

ordinance rates so long as he should desire the water supply.

He pleaded (1) (Rec. p. 58) that his petition was true as to the size of his building and the appliances therein; (2) (Rec. p. 58) that the village of Rogers Park did not pass the ordinance as alleged on November 12, 1888, or any other time; (3) (Rec. p. 58) that plaintiff in error did not by assignment or otherwise become possessed of the rights, etc., alleged to have been granted to Keeler by ordinance; (4) (Rec. p. 58) that no contract ever existed between the plaintiff in error and the village or city by reason of the ordinance alleged to have been passed November 12, 1888; (5) (Rec. p. 59) that the rates, according to the city ordinance, were not in excess of the sum tendered; (6) (Rec. p. 59) that the rules or regulations of plaintiff in error did not prescribe water-rates.

Thereafter plaintiff in error filed its joinder in demurrer to the three demurrers of defendant in error and asked that they be carried back to the petition, and joined issue on the several pleas.

The court (Rec. p. 64) sustained the demurrers of defendant in error, and overruled the demurrers of plaintiff in error, and the latter elected to stand by its respective answers and demurrers.

The case then went to trial on the issues of fact so joined before the Court and a jury, and after the evidence was all in, and after refusing all the instructions offered by plaintiff in error (Rec. pp. 90-91), the Court instructed the jury (Rec. p. 90) to find the issues for defendant in error, which the

jury did accordingly (Rec. p. 61). Plaintiff thereupon entered oral motions for a new trial and in arrest of judgment, both of which were overruled (Rec. pp. 91, 92), and judgment was entered (Rec. pp. 61, 62) for a peremptory writ of mandamus.

No motion in writing for a new trial was filed as required by Sec. 57, Chap. 110, Rev. Stat. Ills., as follows: "If either party may wish to except "to the verdict, or, for other causes, to move for a "new trial or in arrest of judgment, he shall, be-"fore final judgment be entered, or during the term "it is entered, by himself or counsel, file the points "in writing, particularly specifying the grounds of "such motion."

As appears from the foregoing, that there were certain issues of fact presented to the jury, one of which went to the whole cause of action, namely, the allegation by answer that there was ever any ordinance passed by the Board of Trustees of the village of Rogers Park giving to Keeler and his assigns any authority to construct and maintain water-works which fixed water-rates to be charged consumers or fixed any period during which any rights should be enjoyed, or any rates which should remain unchanged. Another question of fact was whether or not the dwelling of defendant in error was of the dimensions and contained the fixtures alleged in the petition; another was whether or not the rules and regulations, referred to in the application for water, made by defendant in error May 17, 1897, contained water-rates. The main issue of law was whether the ordinance of

Rogers Park, if one ever was passed, constituted such a contract as under it plaintiff in error could, during a period of thirty years, maintain, unchanged, a schedule or tariff of water-rates collectible from private consumers, the obligation of which would be impaired or property would be taken without due process of law, by subsequent legislation fixing a different and lower schedule, the question of the reasonableness of the rates in either instance not being raised.

The Supreme Court of Illinois decided against the contention that the city ordinance impaired the obligation of a contract, or took property without due process of law, and therefore this Court takes jurisdiction, if the case be properly removed here by writ of error. If the Federal question "was erroneously decided against plaintiff in "error, then this Court must further inquire, "whether there is any other matter or issue ad- "judged by the State Court which is sufficiently "broad to maintain the judgment of that Court, "notwithstanding the error in deciding the issue "raised by the Federal question. If this is found "to be the case, the judgment must be affirmed "without inquiring into the soundness of the de- "cision on such other matters or issues."

Murdock vs. Memphis, 20 Wall., 590, 636.

"It has been the uniform doctrine of this Court "that, where it appears that the judgment of the "State Court must be affirmed on other grounds "disclosed in the Record, it will not be reversed

"for an erroneous ruling of the State Court on a "Federal question not necessary to the decision of "the cause."

Crescent Live Stock Co. v. Butchers' Union, 120 U. S., 141, 156.

Inasmuch as the rules of this Court do not require plaintiff in error to file its brief and argument in such time that will insure to defendant in error an examination of the same and follow it in his reply thereto, the same sequence of points will be made in this argument as was made in the Supreme Court of Illinois.

BRIEF OF AUTHORITIES.

I.

The several orders on the trial court on the demurrers were not erroneous.

People ex rel v. Pavey, 151 Ill., 101.
C. C. Ry. Co. v. People, 73 Ill., 541.
Belleville v. Ry. Co., 152 Ill., 171.
State v. County Judge, 7 Clarke (Iowa), 186.
Coffyn v. State, 91 Ind., 324.
Connor v. Morris, 23 Cal., 447.
Met. City Ry. Co. v. C. W. D. Ry. Co., 87 Ill., 317.
C. W. I. R. R. Co. v. Dunbar, 100 Ill., 110.
Hangen v. Abilena L. & W. Co., 14 L. R. A., 424.

II.

There was no error in refusing defendant's instructions, and in directing a verdict for petitioner.

Anderson v. McCormick, 129 Ill., 308.
Bradish v. Grant, 119 Ill., 606.

III.

No contract existed between the parties to this suit when the petition was filed, and no valid contract ever existed binding the appellee as claimed.

L. S. & M. S. R. R. v. Richards, 152 Ill., 59. S. C., 30 L. R. A., 33.
Am. W. W. Co. v. State, 46 Neb., 194; 64 N. W., 711.

IV.

The General Assembly possesses all legislation powers not expressly reserved by the Constitution.

Sawyer v. Alton, 3 Scam., 127.
Mason v. Wait, 4 Scam., 127.
People v. Wall, 88 Ill., 75.
Harris v. Whiteside Co., 105 Ill., 445.
Winch v. Tobin, 107 Ill., 212.

A municipal corporation has no power, except expressly granted or necessarily implied from those expressly granted.

Alton v. Aetna Ins. Co., 82 Ill., 45.
Agnew v. Brall, 124 Ill., 312.
Smith v. McDowell, 148 Ill., 51.

A person or private corporation claiming a special privilege, the subject of legislative grant, is held to the strictest account as to his or its authority.

Jackson Co. H. R. Co. v. Interstate R. T. Co., 20 Fed., 306.

IV. A.

Section 14, Article II., Constitution of 1870, prohibits the irrevocable grant of the special privilege of maintaining a fixed schedule of rates and charges for water to be paid by private consumers.

Indianapolis St. Car Co., Case 56, Fed., 746; 166 U. S., 562.

Wagner v. Rock Island, 146 Ill., 139.

Crumley v. Watauga W. Co., 41 S. W. Rep., 1058.

Lumbard v. Stearns, 4 Cush., 60.

Wheeler v. North, Colo. Irr. Co., 10 Colo., 582.

Hangen v. Abilena L. & W. Co., 14 L. R. A., 424.

People v. Green Island W. Co., 56 Hun., 76.

Spring Valley W. W. v. Schottler, 110 U. S., 347.

Smyth v. Ames, 169 U. S., 466.

IV. B.

The General Assembly, aside from any express constitutional limitation, has no power, either directly or through authority which is vested in its municipalities, to irrevocably establish a schedule of water-rates and charges to be paid by private consumers during any specified period.

Ruggles v. People, 91 Ill., 256.
Smythe v. Ames, 169 U. S., 466.
Cooley Const. Lim., 6th Ed., 146, 343, 349.
E. St. Louis v. E. St. L. G. L. & C. Co., 98 Ill., 415.
Milliken v. Edgar Co., 142 Ill., 528.
Carlyle v. Carlyle W. L. & P. Co., 52 Ill. App., 577.

IV. C.

The village ordinance is void under the Fourteenth Amendment to the Constitution of the United States, in as much as it takes the property of the consumer of water without due process of law.

Smythe v. Ames, 169 U. S., 446.

IV. D.

The General Assembly, by Section I, Article X., Chapter 24, Revised Statutes, did not empower the Village Board to irrevocably establish a schedule of water-rates and charges to be paid by private consumers.

I. C. R. R. v. People, 95 Ill., 313.
Ruggles v. People, 91 Ill., 256.

IV. E.

The appellant is subject to any regulation or provision that the General Assembly may at any time deem advisable to prescribe.

Ford v. Chicago M. D. Assn., 155 Ill., 166.
Pa. Coll. cases, 13 Wall., 190.
Miller v. N. Y., 15 Wall., 478.
Shields v. Ohio, 95 U. S., 319.
Greenwood v. Freight Co., 105 U. S., 13.
Spring Valley W. W. v. Scholtter, 110 U. S., 347.
Sioux City St. R. R. Co. v. Sioux City, 138 U. S., 98.
State v. R. R. Tax Com., 37 N. J. L., 228.
Inland Fisheries v. Holyoke W. P. Co., 104 Mass., 446.
S. C., 15 Wall., 500.

IV. F.

The Village Board of Rogers Park did not pass the ordinance in question November 12, 1888, and there is no evidence in that Record that the same ever was passed.

Lindsay v. Chicago, 115 Ill., 120.
Ryan v. Lynch, 68 Ill., 160.
I. C. R. R. Co. v. People, 143 Ill., 434.
Myers v. Vanderbilt, 84 Pa. St., 510.
Est. Tomlinson, 133 Pa. St., 245.

ARGUMENT.

I.

Counsel for plaintiff in error in the courts below contended that the original petition was insufficient in law because it did not set out some ordinance or other municipal action under which the water company distributed water through pipes laid in the street. It is submitted that that question was not and could not have been in issue in this case.

In People ex rel. v. Pavey, 151 Ill., 101, it was held that the pleadings in mandamus under the Illinois statute were governed by the ordinary common law rules. It would have been sufficient in this petition to have alleged that plaintiff in error was a public seller of water in order to fix its clear legal duty to furnish water to defendant in error upon a proper tender of charges. It has been held, repeatedly, that the authority which such a corporation has, its powers, its franchise, is from the statutes, that which comes from the municipality being a mere license.

> Chicago City Ry. Co. v. People, 73 Ill., 541.
> Belleville v. Ry. Co., 152 Ill., 171.

It does not matter to defendant in error, then, in what form that license came, or, even if it be but a tacit permission. If this company had constructed its works and laid its pipes without any express authority from the municipality, its char-

acter as a distributor of water to those desiring it would not be changed.

In State v. County Judge, 7 Clarke (Ia.), 186, the Court held that when the facts stated show a duty to be performed it is not necessary to set out or allege the law. Here the expressed purpose of incorporation and the carrying out of that purpose impose the duty, and no more need be alleged to fix that duty, as one, the performance of which can be compelled by mandamus.

So, too, in Coffyn v. State, 91 Ind., 324, the allegation that a railroad had been permanently located in a township was sufficient, without alleging that the same had been judicially determined.

See, also, Connor v. Morris, 23 Cal., 447, in which it was held that the presumption is that certain warrants were drawn by the auditor according to law, and that if they were not it was a matter of defense to be set up by respondent. And this was the answer of the trial judge to the argument of plaintiff in error on demurrer to the petition. The company is doing business; it is occupying streets with its pipes; the presumption is that it is there by some authority from the municipality. But if it were there as a trespasser upon the public streets that fact would constitute no defense to it in this action, nor give defendant in error any better right to the relief he demanded. If defendant in error had alleged as this argument and this record shows that he would have been obliged to allege, to comply with the contention of plaintiff in error, that it had no authority by ordinance to

lay pipes, but, that, notwithstanding it had laid pipes and was supplying water under its charter powers, it would have made no difference in the issue that could be tried by mandamus.

If this contention should prevail, then in every petition for a mandamus to a public officer there would necessarily be an allegation of when, where, and how he was elected; and for a writ to a railroad company it would be necessary to allege its charter, and the location of its road, and, when the duty sought to be enforced was one arising because of its operation in or through a municipality, the ordinance granting it permission would have to be pleaded; but the contrary is the law, for when one holds himself out as a public officer he can be compelled to perform the duties of the office whether his status be de facto or de jure, and the same applies to a quasi-public corporation.

A somewhat analogous position was taken in Met. City Ry. Co. v. C. W. D. Ry. Co., 87 Ill., 317, and C. & W. I. Ry. Co. v. Dunbar, 100 Ill., 110, and it was contended that these companies could not secure right of way by condemnation until they had secured ordinance rights from the city, but the Court held that the power to secure right of way by condemnation or otherwise came from their charters, and that the right obtained, or to be obtained from the city, was a mere license or designation of location.

Hangen v. Abilena L. W. Co., 14 L. R. A., 424, 428.

But plaintiff in error waived this point by answering over after its demurrer to the petition was overruled.

II.

There was no error in refusing the instructions asked by plaintiff in error, and in instructing the jury to find the issues for the petitioner.

When this case came to trial, there were three issues of fact presented by the pleadings:

First.—On the sufficiency of petitioner's tender under the terms of the city ordinance, and the only element of that tender, not admitted, was whether the premises were of the dimensions and contained the fixtures alleged.

Second.—On the passage by the Village Board of Rogers Park of an ordinance, November 12, 1888.

Third.—Whether the rules and regulations of the company referred to in the application for a water supply embraced a schedule of water-rates.

On this first issue, the burden was on the petitioner and it was proven without any evidence adverse, either drawn out on cross-examination, or introduced by plaintiff in error.

Under the ruling in Anderson v. McCormick, 129 Ill., 308, 317, the Court properly instructed the jury to find for petitioner so far as this issue was concerned.

On the second issue the burden was on the defendant, who introduced in evidence a copy of an

ordinance certified by the city clerk. This was admissible for it prima facie maintained the issue in behalf of defendant and being so admissible it could not be ruled out when overcome by better evidence. To rebut this, petitioner introduced the journal of the Village Board, which, being better evidence, then the certified copy and contradictory thereof, overcame it, and under the ruling in Bradish v. Grant, 119 Ill., 606, the Court properly instructed the jury as to its finding on this issue.

On the third issue the burden was on the defendant below, who abandoned it and did not offer any evidence in support of it, and on that issue the Court properly directed a verdict.

But even if the trial court was wrong in directing a verdict, the appellate court can not review the evidence to ascertain if the instruction was or was not warranted by the evidence because the plaintiff in error did not file its points in writing specifying the grounds of its motion for a new trial as required by Sec. 57, Chap.. 110, Rev. Stat. Ill.

> St. Louis R. R. v. Dorsey, 68 Ill., 326.
> Continental Investment Co. v. Schubnell, 63 Ill. App., 379.

For this reason alone, the Supreme Court of Illinois should have affirmed the judgment of the trial court.

III.

No contract existed between the parties to this suit when the petition was filed, and none is shown ever to have existed, which bound defendant in error to pay the water-rates alleged to have been fixed by an ordinance of Rogers Park.

Plaintiff in error contended that defendant in error was bound by contract to pay the water-rates claimed to have been established by ordinance by the Board of Trustees of Rogers Park, so long as he should take water from plaintiff in error. This claim is based upon an application signed by defendant in error, May 17, 1897 (Rec. pp. 23, 41, 70), in which he applied to plaintiff in error for water to be furnished to the premises in question, which application contains the following language: "Said water to be supplied subject "to the rules and regulations of said company, "now in force, or which may hereafter be enacted "or adopted, which rules and regulations are here-"by made and declared to be part of the contract "between me and said company for supplying said "premises with water."

No evidence was offered on the trial as to what the rules and regulations of plaintiff in error contained, but the allegations of the answer are that the schedule of water-rates was fixed by village ordinance and it is nowhere alleged or proven that any schedule of rates was established by rule or regulation enacted or adopted by the company,

nor that any such rule or regulation required the water consumer to continue taking water for any specified period.

It was alleged in answer and admitted by demurrer that in pursuance of this application defendant in error paid rates demanded by plaintiff in error and received water up to November 1, 1897, that he then refused to pay for the succeeding half year the rates so demanded, whereupon plaintiff in error cut off the water from his premises; that he then tendered the amount which he claimed would be due, computing under the city ordinance, and demanded that the water be turned on, and upon refusal this petition was filed.

It is submitted, in the first place, that if any contract of any kind ever had been in force between these parties, it was no longer in existence or in force when this petition was filed.

Even if it be assumed that signing this application, and paying such rates as were then demanded for the then current half year, did constitute a contract whereby plaintiff agreed to furnish water, and appellee agreed to pay for it at the same rates during all the time the latter should desire water, even such a contract was annulled and canceled and ceased to have life, when plaintiff in error shut off the water and refused to supply it. One can not eat his cake and keep it, too. When defendant in error refused to pay and still demanded water, plaintiff in error had its election, to rescind the contract altogether or to keep on furnishing and hold defendant in error to

the terms of any contract he had made regarding payments.

> L. S. & M. S. R. R. v. Richards, 152 Ill., 59, and notes to the same case in 30 L. R. A., 33, 40.

It is therefore manifest that if any contract ever did exist between these parties, regarding the furnishing of water by one and the paying for it by the other, it was out of existence when this petition was filed, and their relations on the subject were the same as if no contract had ever existed at any time.

But this is proceeding upon an assumption that has no foundation in the facts disclosed by the record. The contention all through is that the rates and charges for water are inflexibly established, not by any rule or regulation emanating from the company but by an ordinance passed by the Village Board.

It would be a most far-reaching construction to hold that when defendant in error applied for water, without stating any period for which he wanted it, and paid six months in advance, what was demanded of him, and agreed that the "rules "and regulations of said company should be part "of the contract between me and said company "for supplying said premises with water," he was thereby bound for so much of the succeeding twenty-one years as he should need the company's water, by anything outside of those rules and regulations, whether the same be village ordinances

or what not. If the company had rules and regulations they should have been offered in evidence that the Court might see whether they contained any allusion to rates, or to the period for which any applicant bound himself. If it had no rules and regulations and wanted to bind any applicant to the terms of the ordinance, it should have been so stated in the form of application. No doubt the company was at perfect liberty to adopt or enact a rule or regulation materially decreasing the rates and charges. Has the Court any right to assume then that the rule of the company, as to rates or period of user in 1897, was the same as that fixed by ordinance in 1888?

If, however, the rule or regulation, to which plaintiff in error claims defendant in error subscribed, was that he should for a period of twenty-one years pay certain rates whether they were reasonable or not, it was an unreasonable rule and could not be enforced. Rules and regulations of a company of this nature must be reasonable.

> Am. N. W. Co. v. State, 46 Neb., 194, and cases cited.

IV.

Rules of construction affecting the powers of the General Assembly, municipal corporations, and private corporations, respectively.

Plaintiff in error claims the right to maintain, unchanged, for a period of thirty years from November 12, 1888, a certain schedule of rates and

charges for water, which it supplies to private consumers, which schedule, it claims, was established by an ordinance of the Board of Trustees of the village of Rogers Park, passed November 12, 1888.

The Village Board could only have been empowered to pass such an ordinance by Sec. 1, Art. X., Chap. 24, Rev. Stat. Ill., which chapter was the village charter. The General Assembly, in passing, said Section 1 was limited by Sec. 14, Art. H., of the Constitution of Illinois of 1870, and by other sections of that Constitution and by the Constitution of the United States.

The General Assembly of a State possesses unlimited legislative powers, unless expressly and unequivocally restrained by the Constitution, but, when there is an express and unequivocal constitutional restriction, it is absolutely binding and any act in violation thereof is void.

Sawyer v. Alton, 3 Scam., 127.
Mason v. Wait, 4 Scam., 127.
People v. Wall, 88 Ill., 75.
Harris v. Whiteside Co., 105 Ill., 445.
Winch v. Tobin, 107 Ill., 212.

A municipal corporation has no power, except expressly granted, or necessarily implied, from those expressly granted.

Alton v. Aetna Ins. Co., 82 Ill., 45.
Agnew v. Brall, 124 Ill., 312.
Smith v. McDowell, 148 Ill., 51.

A person or private corporation claiming a special privilege, the subject of legislative grant is held to the strictest account as to his or its authority.

These principles are most tersely stated in Jackson County Horse R. Co. v. Interstate Rapid Transit Co., 20 Fed., 306, in language which should meet the commendation and approval of this Court, and found on page 307, as follows: "Let me in the outset formulate two or three un-"questioned propositions: (1) The legislature has, "as the general representative of the public, the "power, subject to specific constitutional limita-"tions, to grant special privileges; (2) it may, with "similar limitations, grant the like power to "municipal corporations as to all matters of a "purely municipal nature; but (3) as the posses-"sion by one individual of a privilege, not open to "the acquisition by others, apparently conflicts "with that equality of rights which is the under-"lying principle of social organization and popular "government, he who claims such exclusive privi-"lege, must show clear warrant of title, if not also "probable corresponding benefit to the public. "Hence, the familiar rule that charters, grants of "franchises, privileges, etc., are to be construed in "favor of the government. Doubts as to what is "granted are resolved in favor of the grantor, or "as is often epigrammatically said, 'a doubt de-"stroys a grant.'"

Plaintiff in error, claiming, under an ordinance of the village of Rogers Park, the irrevocable

privilege of maintaining a certain schedule of rates and charges for water to be furnished to private consumers, exclusive within a certain territory, during a period of thirty years from and after November 12, 1888, in showing its "clear warrant of title" so to do, it must appear:

FIRST.—That the General Assembly was not prohibited by the Constitution from granting such privilege, or authorizing its creature, the Village Board, to grant it.

SECOND.—That the General Assembly, either directly or by a delegation of power, through the Village Board, had, aside from any express constitutional limitation, the power to irrevocably establish a schedule of water-rates and charges to be paid by private consumers, during a period of thirty years, or during any other specified period.

THIRD.—That, under the 14th Amendment to the Constitution of the United States, the ordinance claimed to have been passed November 12, 1888, is prima-facie valid.

FOURTH.—That the General Assembly did by Sec. 1, Art. X., Chap. 24, R. S., or otherwise, empower, or attempt to empower, the corporate authorities of any municipality in the State of Illinois to irrevocably establish a schedule of water-rates and charges to be paid by private consumers for any stated period.

FIFTH.—That the reservation clause of the general incorporation act, to-wit., Sec. 9, Chap. 32, R. S., does not subject plaintiff in error to what-

ever rules and regulations the General Assembly might at any time deem advisable to prescribe, including the regulation of its rates of charges.

SIXTH.—That the Village Board of the village of Rogers Park did pass the ordinance of November 12, 1888, which is claimed by plaintiff in error was passed.

SEVENTH.—That the alleged ordinance of November 12, 1888, did establish irrevocably, for a period of thirty years, a schedule of rates and charges for water to be supplied to private consumers.

IV. A.

Section 14, Article II., Constitution Illinois, 1870, prohibits the irrevocable grant of the special privilege of maintaining a fixed schedule of rates and charges for water to be paid by private consumers.

Sec. 14, Art. II., of the Constitution of 1870, is as follows: "No ex-post-facto law, or law impair-"ing the obligation of contracts, or making any "irrevocable grant of special privileges or immuni-"ties, shall be passed." Shorn of language, not applicable to this issue, the section would read as follows: "No law making any irrevocable grant "of special privileges shall be passed." Consequently this branch of the argument resolves itself into the disposition of these inquiries: First.—Is the authorization, under which plaintiff in error claims, a law? Second.—Is it, in terms, an irrevocable grant? and, third, is it a grant of a special privilege?

FIRST.

Sec. 1, Art. X., Chap. 24, Rev. Stat. Ill., under which chapter the village of Rogers Park was, in November, 1888, organized, is as follows: "The "City Council or Board of Trustees shall have the "power to provide for a supply of water by the "boring and sinking of artesian wells, or by the "construction and regulation of wells, pumps, cis- "terns, reservoirs, or water-works, and to borrow "money therefor, and to authorize any person or "private corporation to construct and maintain the "same at such rates as may be fixed by ordinance, "and for a period not exceeding thirty years; also "to prevent the unnecessary waste of water; to "prevent the pollution of the water, and injuries to "such wells, pumps, cisterns, reservoirs, or water- "works." Again eliminating language immaterial to this issue, the section would read as follows: "The Board of Trustees shall have the power to "provide for a supply of water, and to authorize "any person or private corporation to construct "water-works and maintain the same at such rates "as may be fixed by ordinance, and for a period "not exceeding thirty years." No other part of the village charter nor any other law of the State can, with any degree of reason, be claimed as vesting in the Board of Trustees the power to pass the ordinance in question.

It is clear that the act itself and alone gave no authority to Keeler to construct water-works, or to supply water to private consumers, nor did it establish a schedule of rates or charges and it

is equally clear that without the authority conferred by this act the Village Board could not authorize him to do anything in the premises.

By a clause of Sec. 22, Art. IV., of the Constitution of Illinois, the General Assembly is prohibited from passing any local or special law "granting to "any corporation, association or individual any "special or exclusive privilege, immunity, or fran-"chise whatever." In consequence of which, it passed the general law, embraced in the above-quoted section of the city-and-village act, and in pursuance thereof, municipal authorities pass ordinances designating the particular individuals and the particular localities which shall come under the operation of the act. The actions of the two legislative bodies, the General Assembly and the municipal council, combined, constitute the grant of authority; each is a necessary element before the whole is complete.

This Court has repeatedly passed upon the character of this duplex legislation, in determining its jurisdiction.

In the Indianapolis Street Car Company case, 56 Fed., 746; 166 U. S., 562, this question was directly in issue. Under the old city charter, one street railway company, incorporated under a general law, was by ordinance, given certain privileges; under a later city charter, another street railway company, also incorporated under a general law, was, by ordinance, given certain privileges which conflicted with the privileges granted to the first company. Both corporations were citizens of In-

diana. The first company filed its bill in the Circuit Court for the District of Indiana, to enjoin the second company from acting on the ground that it (the first) had contract privileges under the old city charter and the old ordinance, the obligations of which were impaired by the second ordinance passed under authority of the new charter, in violation of the Federal Constitution, which forbids the States from passing laws in impairment of the obligation of contracts, and it was there contended that the Court had no jurisdiction, because, if the obligation of the contract embodied in the old charter and the old city ordinance was impaired it was done by the later ordinance, and not by any State law. Judge Baker of the Circuit Court, in disposing of this question, says: "The "easement to occupy and enjoy the streets of the "city for the purpose of constructing, maintaining, "and operating a street-railway system therein, "can alone be granted by the Legislature. With-"out legislative grant the use of the streets of the "city for such a purpose would constitute a public "nuisance, it is equally clear that in the absence of "a legislative grant of anything to it, the city can "not confer upon any person or corporation the "right to lay, maintain, and operate a railway upon "and along any public street or alley therein. The "easement is a legislative grant of authority to it, "whether made directly by the Legislature itself, "or any of its properly constituted instrumental-"ities. Waite, C. J., in Wright v. Nagle 101 U. S., "794. The authority exercised by the city in grant-

"ing to the defendant the right, privilege or ease-
"ment to lay, maintain and operate a street
"railway upon and along its public streets is that
"of the State itself. It is none the less a legislative
"grant by the State because the authority to make
"it is conferred upon a subordinate body, to which
"the Legislature has delegated a portion of its
"powers. If the authority exercised be that of the
"State itself, whether acting directly through its
"Legislature, or indirectly through a subordinate
"body, to which the Legislature has delegated a
"portion of its powers, it is competent for this
"Court to inquire whether it has exceeded its
"authority and violated the constitutional provi-
"sion in question. Saginaw Gas Light Co. vs. City
"of Saginaw, 28 Fed., 529."

The Court then proceeds to review a large number of authorities upon this proposition, and sums up the matter thus, discussing the case of Shreveport v. Cole, 129 U. S., 536:—"The case simply
"declares that no Federal question is involved
"when a law properly construed confers no author-
"ity upon a municipality to do the thing which
"is to impair prior contract rights. The converse
"must be true—that a Federal question is pre-
"sented, if, when properly construed, the law of
"the State does prima facie confer authority upon
"the municipality to grant rights and immunities
"which would impair prior contract rights, the
"said municipality, under cover of such State law,
"has, in the manner provided, actually made such
"grant."

And in conclusion he says: "The Federal ques-"tion in all such cases is, does the statute of the "State, or the grant made by the municipality "thereunder, when fairly construed, and treating "it as otherwise valid, present a case falling within "the prohibition of the constitutional guarantee "in question? If the law of a State or a municipal "grant under its authority, is a valid enactment, "except for its repugnancy to the provisions of the "Constitution which prohibits a State from pass-"ing any law impairing the obligation of contract, "then such repugnance presents a Federal ques-"tion, and gives this Court jurisdiction."

In affirming the decision of Judge Baker, this Court says (166 U. S., 562): "There is no doubt "that the Circuit Court had jurisdiction of the case, "notwithstanding the fact that both parties are "corporations and citizens of the State of Indiana. "It should be borne in mind in this connection that "jurisdiction depended upon the allegations of the "bill, and not upon the facts as they subsequently "turned out to be. The gravamen of the bill is "that, under the act of the General Assembly of "1861, and the ordinances of January 18, 1864, and "April 7, 1880, the Citizens' Railroad Company "had become vested with certain exclusive rights "to operate a street railway in the city of Indian-"apolis, either in perpetuity or for a term of thirty "years, or thirty-seven years, which the city had "attempted to impair by entering into a contract "with the City Railway Company to lay and oper-"ate a railway upon the same streets. All that is

"necessary to establish the jurisdiction of the "Court is to show that the complainant had, or "claimed in good faith to have a contract with "the city, which the latter had attempted to im- "pair. Conceding that the Legislature of the State "alone had the right to make such grant, it may, "as was observed in Wright v. Nagle, 101 U. S., "791, 794, exercise its authority by direct legisla- "tion, or through agencies duly established, hav- "ing power for that purpose. The grant, when "made, binds the public, and is directly or indirect- "ly the act of the State. The easement is a "legislative grant, whether made directly by the "Legislature itself or by one of its properly con- "stituted instrumentalities." * * * "That the "complainant had a contract with the city is en- "tirely clear." * * * "That the city did at- "tempt to impair this contract by the agreement "of April 24, 1893, with the City Railway Com- "pany, and its ordinance ratifying the same, is "equally clear. This contract was entered into in "pursuance of a supposed right given by an act of "the General Assembly of March 6, 1891, known "as the city charter, the 59th section of which "enacted that 'the Board of Public Works shall " 'have power—to authorize and empower by con- " 'tract telephone, telegraph, electric light, gas, " 'water, steam or street car or railroad companies " 'to use any street, alley, or any other public place " 'in such city—provided that such contract shall, " 'in all cases, be submitted by said Board to the " 'Council of such city, and approved by them by

"'ordinance, before the same shall take effect.' "This contract and ordinance of April 24, 1893, "even if otherwise valid, should not be construed "to interfere with the rights of complainant to "occupy the streets of the city under the act of "1861 and the ordinance of January 18, 1864, with- "out coming in conflict with that provision of the "Constitution which forbids States from enacting "laws impairing the obligation of contracts."

It is perfectly clear that from whatever source or sources the right emanated, vesting in Keeler and his assigns the right to maintain for a period of thirty years a fixed schedule of water-rates and charges to be paid by private consumers, the medium by which their right became vested was a law.

SECOND.

There can be no doubt but that, in terms, the ordinance attempted to make an irrevocable grant of whatever rights and privileges it attempted to grant. The language is: "The said grantor or "assigns shall charge the following annual water- "rates to consumers of water during the existence "of this franchise."

THIRD.

The right to have maintained a schedule of water-rates and charges, fixed by the municipal authorities, is a special privilege. The relations between a water-company and its customers, in the matters of rates and charges and the duties

and obligations of the one to the other, are identical with those between a common carrier and its customers or patrons.

Wagner v. Rock Island, 146 Ill., 139.
Crumley v. Watauga Water Co., 41 S. W. Rep., 1058.
Lumbard v. Stearns, 4 Cush., 60.
Wheeler v. Northern Colo. Irrig. Co., 10 Colo., 582.
Haugen v. Abilena, L. & W. Co., 14 L. R. A., 424.
People v. Green Island W. Co., 56 Hun., 76.
Spring Valley Water Co. v. Schottler, 110 U. S., 347.

That is to say, to the extent of its capacity, a water-works company, or an individual in like character, must furnish water to every applicant, and at reasonable rates. If those rates are fixed by law, it is a special advantage or privilege either to the purveyor or to the consumer. If they are fixed unreasonably low, they would be of special advantage or a special privilege to the consumer. But if they are not unreasonably low or are unreasonably high, they are of special advantage or a special privilege to the purveyor. It is always assumed that a legislative grant to an individual, if accepted, is of benefit or advantage to the grantee from the mere fact of its acceptance. Consequently, as the sole advantage, to the grantee under the ordinance of November 12, 1888, and his assigns, is the revenue to be obtained by

the sale of water, the schedule of rates and charges fixed by the ordinance must be presumed to be a special advantage or benefit, and the right to maintain them, unchanged, during a fixed period, a special privilege.

In C. G. Ry. Co. v. C. C. Ry. Co., 62 Ill. App., 502, the Court passed directly on two questions involved in this case, and declared that a city ordinance passed under express charter authority is a law, and if it attempt to grant special privileges, not common to others, it comes under the 14th Sec. of the Bill of Rights in the Illinois Constitution and is revocable.

Exactly the same ruling was made by the Supreme Court of Alabama in the Birmingham St. Ry. case, 79 Ala., 465, 473, under a Constitution identical with that of Illinois in this respect.

But plaintiff in error committed itself on this question in its amended answer (Rec. p. 52) wherein it alleges that "relying upon the rights, benefits, "and privileges, franchises and immunities, granted by or contained in the said ordinance, and "particularly upon the rates therein provided to "be paid by said village and by the inhabitants "thereof for a supply of water, as hereinabove "set forth, a large number of persons did associate "themselves together for the purpose of forming "a corporation known as the Rogers Park Water "Company, the present defendant herein."

It is therefore clear that by the General Assembly and its creature, the Board of Trustees, a law was passed granting to Keeler the irrevoc-

able special privilege of maintaining a certain specified schedule of water-rates and charges for a period of thirty years, and as such was clearly unconstitutional and void.

IV. B.

The General Assembly of the State of Illinois, aside from any express constitutional limitations, has no power, either directly or through authority which it vests in its municipalities, to irrevocably establish a schedule of water-rates and charges to be paid by private consumers during any specified period.

This was the only question passed upon by the Supreme Court of Illinois.

The ordinance provides that Keeler or his assigns "shall charge the following annual water-"rates to consumers of water during the existence "of this franchise."

Assuming for the present that the ordinance or contract binding Keeler and his assigns to make certain charges during a certain period, equally binds the consumers to pay the same, or do without, then the question fairly arises, has the legistive branch of the government power to make a binding contract coercing the people, by its terms, when those terms relate only to the private affairs of the people?

It may be presumptuous to suggest that the eminent jurists and lawyers who respectively decided and argued the cases of the class to which

the case at bar belongs, from Munn v. Illinois, 94 U. S., 113, to the present time have reasoned from a false premise, to wit: that the legislative branch of the government in any of the United States has the power, under any circumstances, to establish or fix a price which any vendee must pay for any commodity or any service; but it is respectfully submitted such is the fact.

Take the terms "vendor" and "vendee" in their broadest sense and as generic terms, so that "vendee" shall include all those who buy or get for a price the benefit or use of any commodity which they do not produce themselves, or of any service which they do not perform themselves, and so that "vendor" shall include all those from the vendee gets the commodity or service.

In all ordinary matters, the laws of supply and demand and competition regulate prices, and no one would for a moment admit the power of government to interfere, for these prices are regulated by contract, and every man is free to enter into any contract he chooses. But, when the nature of the business transacted by the vendor is such that he is under a legal duty to sell on demand and the vendee has a legal right to buy, then the vendor is only entitled to a reasonable price and the vendee is only obliged to pay what is reasonable. This is the common law relation between the parties, each having an inherent, inalienable right, held to be a self-evident truth in the Declaration of Independence and guaranteed them in the Bill of Rights in the Constitution of Illinois,

and probably of every other State in the Union. No Legislature nor any sovereign can deprive them of this right. In the exercise of this mutual right, the vendor demands his price, and the vendee's only recourse is to pay the demand and bring his suit to recover back the excess over what is reasonable, and in the trial of such suit the burden of proof is on the vendee to show that the price so demanded and paid is in excess of what is reasonable. The only power which the Legislature can exercise in the premises is to shift this burden of proof, and this it can do under the powers vested in any Legislature, and the expression of the Legislature, in no matter what language it be couched, amounts to no more than a declaration that at the time the enactment be passed, the price or prices mentioned therein are, in the judgment of the legislative body, what are at that time reasonable. It is respectfully submitted that the Supreme Court of Illinois fell into error when it declared that the rates so fixed by the legislative department became binding on the vendor for all the time mentioned, the vendor having accepted the act and proceeded thereunder. If in the course of time it proved from changed conditions that if the vendor should be held to such prices it could not only make no profit, but would be subjected to loss; then it should be allowed to show that the prices had become unreasonably low and to recover what were then reasonable. Otherwise, in a case like that at bar, a water company might accept, in good faith, an

ordinance giving it the right to construct water-works and fixing the rates, the same being based on what was, at the time, a reasonable basis, and, at the end of five years, from some wholly unforeseen reason, it would become impossible to furnish water at such rates without an actual loss. It would be a harsh doctrine that would hold the company to furnish water at such rates, with the possible alternative of quitting business at a loss of almost the entire amount of its expenditures in constructing the plant.

There can be no other theory, reconcilable with the rights of all parties and common justice as well, than that the action of the Legislature in establishing rates is merely the establishment of a rule of evidence, and that the power of the Legislature is continuous, so that one body can not bind its successors.

If these cases are to be decided on the theory advanced in Smyth v. Ames, 169 U. S., 466, that when the prices, mentioned in the legislative enactment, are so low as to give the vendor no profit, the enactment is void, because it takes the property of an individual without due process of law; then any enactment naming prices is void for the same reason, for if an individual vendor has a property right in one per cent profit, he has an equal property right in any percentage of profit he can wring from the vendee.

If, however, the cases are to be decided upon the old-time theory that the courts can always inquire into the reasonableness of the charges mentioned

in the enactment, then they must be based upon the underlying theory that, as between vendor and vendee, the price must be reasonable, and as what may be reasonable, between a vendor and vendee at one time, may be unreasonable at another, the Legislature would practically be shorn of all power in the premises. If the case of Smyth v. Ames were to be started over again today, would the decree be res judicata, or could the parties show that under the conditions as they now exist the prices named are reasonable? If that judgment be a bar to another proceeding, then, unless the Legislature should happen to strike on a price which the Court, at the time the case should be heard, would agree with the Legislature on the question of reasonableness, the enactment would be adjudged unconstitutional, and such adjudication would be a bar to any future reexamination of the question.

Few of these cases have arisen from controversies between the vendor and vendee; between whom always the question of reasonableness is the one of paramount importance and the one ever present. But where the vendee demands the commodity or service and is entitled in law to it upon paying a reasonable price therefor, and the question of what is a reasonable price is put in issue, then it is for the Court to determine in each case what is reasonable, and the one alleging has the burden of proving. The Court is not bound by what the Legislature may have said is reasonable, and the only question is what effect has the enact-

ment. It is either absolutely void and of no effect at all for want of power in the Legislature, or it has effect only as a rule of evidence, making prima-facie reasonable the price mentioned, and throwing upon the party claiming it to be unreasonable the burden of proof. Can then such an enactment be the subject of an irrevocable contract?

Suppose there had been no ordinance fixing rates, neither the alleged ordinance of 1888 nor that of 1897, and defendant in error had demanded water of plaintiff in error and it had been peremptorily refused, the Court on petition would issue its writ of mandamus compelling compliance with the demand and would leave the "company free to charge for its services upon a quantum meruit." Cumberland T. & T. Co. v. Morgans L. & T. R. Co., 24 So., 803.

But, if, upon such demand being made, plaintiff in error had expressed its willingness to comply, upon payment of a certain sum which it should name, defendant in error would have no standing in a proceeding for mandamus, but would be obliged to pay the amount demanded and sue to recover back the excess over which he claimed was a reasonable charge. Then the burden of proof would be on him to show what was reasonable; assuming, however, that the alleged ordinance of 1888 was in force and the price claimed by plaintiff in error was in accordance therewith, and that defendant in error claimed the same to be unreasonably high then his rights and his remedies would be the same and the same burden

of proof would be upon him. It seems to be conceded by the courts that, where in such a case, rates or charges are specified in an enactment, a tender of those rates gives the vendee a remedy by mandamus; and it also seems to be well settled that the respondent may in defense show that the legal requirements are unreasonable.

O. & M. R. R. Co. v. People, 120 Ill., 200.
C. & A. R. R. Co. v. People, 152 Ill., 230.

If then, as between the vendor and vendee, when a statutory price is fixed, the latter has a remedy by mandamus, but the former may successfully defend by showing that the statutory price is unreasonably low, consequently, the effect of the enactment is to give to the vendee a simple, effective, and complete remedy by mandamus when the statutory rates are in fact reasonable. The only question then is, can the Legislature by successive enactments, keeping up with changing conditions affecting the reasonableness of charges, give him this remedy; or is the Legislature bound by its first enactment and the vendee left to his ordinary common-law remedies? One Legislature can not bind its successor.

Cooley Const. Lim., 6th Ed., 146, 343, 349.
E. St. Louis v. E. St. L. G. L. & C. Co., 98 Ill., 415.
Milliken v. Edgar Co., 142 Ill., 528.
Carlyle v. Carlyle W. L. & P. Co., 52 Ill. Ap., 577.

The reasoning of the Appellate Court of Illinois in the Carlyle case is applicable here, whether it was applicable to the case then under consideration or not. In that case, the matter before the Court was simply the extent of the power of a municipality to contract for supplies to be furnished to it. It was not a legislative power, but a contractual power; while here, the power under consideration, is purely a legislative power. In the case of the exercise of purely legislative powers in the consideration of those subjects where each General Assembly corrects evils and insures rights then existing, it must, in the very nature of things, be untrammeled by any act of its predecessors. Otherwise, one General Assembly would not only be a legislative body, but would be a prophet, seer, and revelator, prying far into the future; determining the needs and wants of the people, years in advance; and pass acts binding its successors; and thus, the work of succeeding assemblies, could be narrowed and limited and reduced to merely making appropriations and confirming gubernatorial appointments. This Court is familiar with all its decisions from the early cases of Munn and Rugles to the late Nebraska Rate case, and it is submitted that those, which were not decided with this theory as the basis, would have resulted the same if this theory had been strictly followed. Moreover, this case is between the purveyor and consumer, the vendor and the vendee, while the later and nearly all the earlier cases in this Court have been between the "vendor" and the State.

In this connection, reference is made to a statement of counsel for plaintiff in error in the courts below, that the reasonableness of rates is an exclusively legislative question. It is submitted that no Court in this country concedes this point. From the Munn Warehouse case to the Nebraska Rate case, the courts have tenaciously clung to the right and to the exclusive right of declaring conclusively whether a rate or charge fixed by legislative action is reasonable; conceding only to the Legislature the power to declare what is prima-facie reasonable; and even in the matters under consideration here, the General Assembly of Illinois, in the act of 1891, concedes to the courts the ultimate power of determining the reasonableness of the action of any municipality thereunder, and adds to that power that which, in the Regan Texas case, was held not to exist in the Court, to wit: the power to review and necessarily to amend and correct the municipal action to make it conform to justness and reasonableness.

IV. C.

The village ordinance is void under the Fuorteenth Amendment to the Constitution of the United States, in as much as it takes the property of the consumer of water without due process of law.

Whenever any legislative body establishes rates and charges to be paid to a quasi-public corporation, the presumption of law is that they are rea-

sonable at the time of the enactment; therefore, it must be presumed that the rates and charges fixed by the Chicago ordinance of October 18, 1897, are just and reasonable and, as a necessary conclusion, that the rates and charges as fixed by the Rogers Park ordinance of November 12, 1888, have become and are now unjust and unreasonable; consequently, the Rogers Park ordinance is prima facie or presumptively unconstitutional and void, as taking from the consumer's money or property arbitrarily and without due process of law.

In Smyth v. Ames, 169 U. S., 446, the laws fixing rates and charges were held unconstitutional and void, because the same were fixed so low that they, in effect, took the property of the company without due process of law. If an arbitrarily fixed schedule of rates and charges, because too low, in effect took the company's property without process of law, by parity of reasoning a schedule which arbitrarily fixed the rates unjustly and unreasonably high would take the consumer's or the patron's property without due process of law. The doctrine is equally applicable in the one case as in the other, and should be more readily applied to relieve the people of a burden than to protect the property interests of a corporation. A careful examination of the opinions of the Supreme Court of Illinois in the Ruggles, Munn and Illinois Central cases, the pioneer cases in this line, makes it perfectly apparent that that Court considered that the acts of the General Assembly involved in those cases were simply and solely rules of evidence es-

tablished by the legislative department under which the rates and charges so established should be taken in any court as prima-facie reasonable, throwing the burden of proof on any one objecting to them to show that they were unjust and unreasonable.. Before the passage of those acts, any rates might be charged which the carrier or warehouseman thought could be collected, and the burden of proof was on the shipper to show that they were unreasonable or unjust. It was nearly impossible for the shipper to secure and introduce the necessary proof, which was all in the hands of the carrier or warehouseman. The Legislature took up the matter and, to prevent extortion, established what, from the best sources obtainable, were reasonable and just rates, leaving alike to the carrier or warehouseman and shipper the right to contest in the courts the question of reasonableness and justness; but in all such contests establishing as a rule of evidence that the statutory rates should be prima-facie reasonable and just. The sole object of the acts was to prevent extortion, which brought them clearly within the police power of the State, a power that must be continuing and ever existing in the Legislature, and in the exercise of which, one General Assembly can not hamper its successors. This theory of the Illinois Court was carried out in this Court, but, unfortunately, the objection, urged by the carriers and warehousemen that the obligation of contracts was being impaired, was not met squarely, but evaded and a loophole was left into which the

Fourteenth Amendment has found lodgment, until this court has entirely abandoned the original theory and has declared the Nebraska law unconstitutional, because the rates fixed are so low that the carrier can not pay expenses out of its receipts; and, hence, its property is taken without due process of law. While it is respectfully submitted that the original theory is the true one, and that such a law can not be unconstitutional, though it may be void because it is unreasonable, like any other police regulation, and that the presumption of reasonableness, based upon the rates fixed by law, can in any case be overcome by proof of what is actually reasonable; yet, defendant in error is willing to accept whichever theory this Court may now adopt. For if such a law can be regarded as merely a rule of evidence, throwing the burden of proof in most cases on the carrier, warehouseman, water company, or what not, then it is passed under that power of the Legislature which makes it its duty to protect the people against extortion and unjust discrimination by those who enjoy practical monopolies and can be exercised whenever and as often as the necessity arises, and the Legislature itself is the sole judge of when and how often that necessity arises, and one Legislature can no more bind its successor in this matter than in the passage of purely criminal statutes.

If, on the other hand, the Court should follow this theory of the later cases, that the enactment is of such a position and unyielding nature, that, if it remains as a law, its effect will be to take

property without due process of law, unless upon examination the rates established by it be found to be exactly just and reasonable, then, like a two-edged sword, it must cut either way, for if by being too low the property of the carrier, etc., be taken without due process of law, then by being too high the property of the shipper, etc., is taken without due process of law. Now, every legislative enactment is presumptively just, valid, and reasonable; therefore, the act of 1891 and the ordinance of 1897 are presumptively just, valid, and reasonable, and the water-rates and charges established by the ordinance of 1897 are presumptively just, valid, and reasonable, and any higher rates are presumptively unjust and unreasonable, and therefore take the property of the water consumer without due process of law, and the ordinance is void under the Fourteenth Amendment. The water consumer's money is his property, as much as the water company's money is its property, and the law that protects the property rights of the one should protect the property rights of the other, and to the courts we ultimately look for that equal protection under the laws which the Constitution guarantees to us.

In I. C. R. R. Co. v. People, 95 Ill., 313, the charter provided that "the board of directors shall "have power to establish such rates of toll for the "conveyance of persons and property upon the "same [the road] as they shall from time to time "by their by-laws direct and determine, and levy "and collect the same for the use of said company."

The Court held that while the charter was a contract, the right to establish rates of toll was not placed exclusively in the board of directors, and that the Legislature might exercise its powers in that behalf to prevent extortion.

The prior case of Ruggles v. People, 91 Ill., 256, came with the I. C. case to this Court, and both are reported in 108 U. S., the former at page 526, the latter at page 541. The charters under consideration in those cases are similar. In his separate opinion in the Ruggles case, Mr. Justice Harlan differs with the Court in one particular, namely, he holds that the charter was a contract whereby the company "acquired an exemption from abso-"lute legislative control as to rates," but he interpolated the element of reasonableness in the exercise of that contract right, and thereby in effect held that neither the Legislature nor the board of directors could establish rates of toll which were unreasonable, and as it did not appear that the rates fixed under the subsequent act of 1871, were unreasonable, he therefore concurred in the ultimate results of the decision of the Court. Reading into this case, Mr. Justice Harlan's doctrine, and we have it that the consumers have an inalienable right to have water from the plaintiff in error at reasonable rates, and as it does not appear that the rates, established by the ordinance of 1897, are unreasonable, they must prevail.

IV. D.

The General Assembly of Illinois by Section 1, Article X., Chapter 24, R. S., did not attempt to empower the Village Board to establish a schedule of water-rates and charges to be paid by private consumers.

The language of this section, so far as material here, is that "the Board of Trustees shall have the "power to provide for a supply of water, and to "authorize any person or private corporation to "construct water-works and maintain the same at "such rates as may be fixed by ordinance, and for "a period not exceeding thirty years."

"A doubt destroys a grant." As will be seen, this rule is applied in construing the powers of a municipal corporation the same as in case of a private corporation. Therefore, if there be any doubt concerning the claim that the above language empowered the Village Board to fix irrevocably and irrepealably, for a period of thirty years, a schedule of water-rates and charges to be paid by private consumers, then the supposed grant of power is destroyed.

It must be always borne in mind that the power in the Legislature to fix rates is the police power, and its exercise in the premises is to prevent extortion and unjust discrimination; and that the very strongest presumptions are against any curtailment of that power, even if it be conceded that it can be curtailed at all.

In the first place, it is not expressly stated, nor necessarily implied, that the rates to be fixed by ordinance are the rates to be paid by private consumers. It is a well-known fact, and one emphasized by the ordinance in question, that there may be one set of rates for the municipality to pay and a different one for the private consumer to pay. The municipality itself must use water for flushing sewers and extinguishing fires.

In the second place, nothing in the language of the statute can be inferred to authorize the Village Board to fix any rate by ordinance irrevocably and irrepealably, and, in view of the language of Sec. 14, Art. II., Constitution, it must be presumed that the General Assembly did not intend to declare that such ordinance might, at the will of the Village Board, be irrevocable or unchangeable in terms. And in the third place, there is no reason for applying the language "and for a period not "exceeding thirty years" to the continuance of an unchanged schedule of rates and charges. If it had been intended that this phrase should have the application claimed, the word "and" is superfluous, and the comma preceding it is out of place, and the sentence would have read simply, "to con-"struct and maintain the same at such rates as "may be fixed by ordinance for a period not ex-"ceeding thirty years." It is true that punctuation marks are worthy of little consideration in construing a statute, but it is submitted that this
1 comma, taken in connection with the conjunction
3 when the rule of strict construction is to be ap-

Lines numbered 3 and 7 misplaced.

following, it is worthy of some notice, especially which the water-works may be maintained by the plied. Giving some weight to this punctuation mark and the succeeding conjunction, the clause is undoubtedly referable to the period during grant or license, and as its force may be exhausted in this one application there is no ground for giving it a double application without express words to that effect.

While legislative action has little weight with the courts in the interpretation of a statute, it is entitled to some consideration. The above-quoted clause is a part of the city and village incorporation act, which was approved April 10, 1872. At the same session, the General Assembly passed an act entitled "An Act to enable cities and vil-"lages to contract for a supply of water for public "use and to levy and collect a tax to pay for the "water so supplied," approved, April 9, 1872. Both acts went into force, July 1, 1872. The latter act was amended both in title and in body in 1885, so as to include incorporated towns and as so amended is still in force; and provides that such municipalities may contract with the owners of water-works "for a supply of water for public use "for a period of not exceeding thirty years." Again, in 1891, the General Assembly passed the act, under which the city ordinance of 1897 was passed, authorizing municipalities to prescribe by ordinance maximum rates to be charged by prior existing companies as well as those subsequently to be created. It is apparent from these that the

General Assembly treated the phrase "and for a "period not exceeding thirty years" in the general city and village act, as referring to the period of the license or grant to operate and not to the fixity of rates and charges.

In I. C. R. R. Co. v. People, 93 Ill., 315, the charter before the Court provided that the board of directors should have power to establish rates of toll from time to time and levy and collect the same, but that Court held, and was sustained by this Court, that "all this is, by necessary implica- "tion, subject, as all citizens are, to the legislative "powers of the State to define, prohibit, and punish "extortion." Subsequent decisions fully sustain the decision in that case and the Ruggles case that nothing but the most direct, positive, and unequivocal language of a grant can take from the Legislature this greatest and most beneficent of all its powers, to define, prohibit, and punish extortion.

IV. E.

Plaintiff in error is subject to any regulations or provisions that the General Assembly may at any time deem advisable to prescribe.

It was alleged and admitted that plaintiff in error was incorporated under Chapter 32, Rev. Stat. Ill., Section 9 of which, without the proviso, is as follows:

"The General Assembly shall, at all times, have "power to prescribe such regulations and provi- "sions as it may deem advisable, which regula-

"tions and provisions shall be binding on any and "all corporations formed under the provisions of "this act."

That acting under this reservation of power the General Assembly could, at any time, prescribe reasonable regulations and provisions governing the corporation is settled beyond question by the following cases:

Ford v. Chicago M. D. Ass., 155 Ill., 166.
Penn. Coll. Cases, 13 Wall., 190, 213.
Miller v. New York, 15 Wall., 478.
Shields v. Ohio, 95 U. S., 319.
Greenwood v. Freight Co., 105 U. S., 13.
Spring Valley W. W. v. Schottler, 110 U. S., 347.
Sioux City St. R. Co. v. Sioux City, 138 U. S., 98.
State v. R. R. Tax Comsn., 37 N. J. L., 228.
Inland Fisheries v. Holyoke W. P. Co., 104 Mass., 446; 15 Wall., 500.

Citizens Savings Bk v Owensboro 173 U.S. 636

In Shields v. Ohio this doctrine was applied to a change in railroad rates, and in Spring Valley v. Schottler to water-rates. No question is made in this case that the Chicago ordinance of October 18, 1897, establishes unjust or unreasonable rates, and if it did, the act of 1891 under which it was passed, gives ample remedy for correcting it. Nor is it claimed that the fixing of water-rates is not a regulation. In fact, it was claimed that this was a rule and regulation of the company; and if it was, the Legislature reserved the right to prescribe it.

IV. F.

The Village Board of Rogers Park did not pass the ordinance in question November 12, 1888, and there is no evidence in the record that the same was ever passed.

The fact, which was admitted on trial, that the Rogers Park Water Company has, ever since a date very soon after November 12, 1888, operated a water-system in the territory then embraced in the village of Rogers Park, and has all the time been recognized by that village and the city of Chicago as operating the same under due legal authority, does not even raise the slightest presumption that a schedule of rates has been established by ordinance, and, in fact, simply raises the presumption that the company is there by right or permission with its common-law duty to furnish water at reasonable rates.

A direct issue was made by plea on the passage of the ordinance set up in the answer as having been passed by the Village Board of Rogers Park, November 12, 1888. To sustain that issue appellant introduced in evidence a copy of an ordinance, to which was attached the certificate of the City Clerk of the city of Chicago, in which he certified that the same was a true and correct copy of an ordinance passed by the Board of Trustees of the Village of Rogers Park November 12, 1888, and recorded in Book of Ordinances. This was in compliance with Sec. 11, Art. VI., Chap. 24, Rev. Stat.

Ill., which makes a copy, so certified, "prima-facie "evidence" of the passage of the ordinance.

But this prima-facie evidence may be completely overcome by the journal of the meeting at which the ordinance is claimed to have been passed if the record of such meeting shows that no such action was taken.

Lindsay v. Chicago, 115 Ill., 120-124.

In Spangler v. Jacoby, 14 Ill., 297, the Court, on page 300, says: "But when the journal is in ex- "istence, and it fails to show that the act was "passed in the mode prescribed by the Constitu- "tion, the presumption is overcome, and the act "must fall."

In Ryan v. Lynch, 68 Ill., 160, the Court in considering a certified copy of the journal of the State Senate says, on page 163: "It proves what pro- "ceedings were had in the Senate in relation to "the passage of the bill, and there can be no in- "ference that any other proceedings were had, for "it is shown that all are given that relate to the "subject," and on page 164: "the bill, therefore, "never became a law. * * * It was as com- "pletely a nullity as if it had been the act or "declaration of an unauthorized assemblage of in- "dividuals."

In I. C. R. R. Co. v. People, 143 Ill., 434, 441, it is said: "It is not denied that the amendatory act "received the signatures of the speakers of both "houses and the approval of the Governor. Such "verification is prima-facie evidence of its validity

"as a legislative enactment; but it is the settled "law of this State that the journals of either "branch of the Legislature may be resorted to for "the purpose of overcoming such prima-facie evi-"dence. It may be shown from the journals that "an act was not passed in the mode prescribed by "the Constitution."

Section 40, of the City and Village Act, Chap. 24, Rev. Stat. Ill., in prescribing the duties of the Board of Trustees declares: "It shall keep a jour-"nal of its own proceedings."

The journal was produced by a clerk from the City Clerk's office, whose testimony is set out in pages 84-88 of the Record, from which it appears that the journal showed the full record of a meeting beginning with the words: "Regular meeting. "November 12, 1888, Present: Mess. Daly, Phelps, "Sturgis, Roberts, Phillips, Ceperly," and ending with the words: "On motion of Mr. Phelps, ad-"journed." That between such beginning and such ending, no record is made of the passage of the ordinance in question; that about in the middle of the record of this meeting, and on the margin is written, in ink, the words "here insert amend-"ment." It does not appear from the record of this case that there was any amendment of the record authorized by the Board. After the ending of the record of the meeting, and after the words "on motion of Mr. Phelps, adjourned," is written the following, in ink: "Amendment. The ordi-"nance granting the franchises for water supply "to H. E. Keeler was read by the clerk and amend-

"ments noted. Mr. Phelps moved that the ordi-"nance be passed as read. Ayes: Phelps, Sturgis, "Roberts, Phillips; nays: Ceperly." Then on the margin of the record, where these last-quoted words are written, appears the word "void" in lead pencil, and across these last-quoted words are twelve straight pencil marks drawn criss-cross. It does not appear from the record who wrote the amendment or when it was written, nor does it appear from the record who wrote the word "void," or who made the criss-cross lines, nor when the one was written or the others were made.

There is no doubt but that the journal is conclusive evidence of what did transpire at the meeting, and its silence on any question is conclusive evidence that such question was not before the board. Therefore, the prima-facie evidence of the passage of the ordinance made by the certificate of the city clerk is absolutely overcome by the journal, as the same appears to have been originally written up. Admitting the law to be that the Village Board could order its record amended at any time, it does not appear that such order was ever made by the Board, or that any amendment to the record, as originally written up, was ever authorized by it. Admitting, also, the law to be that the same clerk who wrote the original record could, without an order from the Board, correct the same or insert something which he inadvertently or negligently had left out, yet it does not appear from this record that the same clerk who wrote this amendment wrote the original.

The question then is, does the finding of a purported amendment, following the original record, without proof that it was ordered by the Board, or that it was written by the same clerk who wrote the original, raise the presumption that the amendment discloses the truth as to the facts? If it does, then the finding of the word "void," written on the margin of the amendment, and the striking out of the amendment by the criss-crossing raises the presumption that they represent the true facts and the latest information and conclusions, as to what are the true facts. If the condition of the record is to raise any presumptions which will do away with the necessity of direct proof, then the condition in which it is found must be presumed to be a declaration of what was the fact, namely, that the record was written up originally showing all that was done at the meeting; then, as an afterthought, the amendment was added; and then, upon more mature deliberation and additional reversion to the memory, or, perhaps, with the memory aided by something extrinsic, the amendment is stricken out.

It is respectfully submitted, that to any one experienced in the proceedings of municipal legislation bodies, it would appear that at the meeting of November 12, 1888, some one made some mention of the ordinance in question, and that in the hurry of taking rough minutes of the meeting the clerk either made no memorandum of it at all, or made some mark, relying upon his memory to supply what he had not time to write; that when he

came to write up the journal, he did not notice his mark, if he made one, or if he had made none, forgot what had been said or done, and, then, when his record was written up, he recollected that something had been said about it, and wrote up what now appears as an amendment to the record; and, proceeding on that theory, recorded the ordinance as having been passed on that day. Then, when the journal was read at a subsequent meeting for approval, and when he was using a pencil and not a pen he corrects his error by writing the word "void," and striking out the amendment and leaving the record as it was originally written.

The clerk who produced the journal in court testified that he had been an employe of the city clerk since May 1, 1895, and that he did not remember ever having seen this amendment without the erasures or erasing marks or the word "void." Here is a record more than nine years old which had been in the custody of the city clerk as successor to the village clerk since the annexation of the village to the city, April 4, 1893. It is produced in court by a clerk from the city clerk's office who has been in the employ of the city clerk since May 1, 1895, who does not know who made the pencil erasures, but thinks they were not made in the city clerk's office, and who never saw the amendment without them.

In the matter of the estate of Tomlinson, 133 Pa. St., 245, the Court discusses the legal effect of lead-pencil cancellations of ink-written documents and cites Myers v. Vanderbilt, 84 Pa. St., 510, in

which are collected the authorities holding as admissible in evidence, contracts, notes, book-accounts, and wills written in pencil, and it is respectfully submitted that if the Court shall presume that the village clerk wrote the amendment it shall also presume that he made the cancellation, and that that which appears to have been done last in time expresses the truth and that the ink-written amendment is canceled by the pencil marks and writing.

Writing a brief for defendant in error in this Court is like preparing for trial at nisi prius—trying to anticipate what plaintiff may say, or do. In the courts below, it relied on its claim that it had a certain contract right created by the village ordinance of 1888, the obligation of which was impaired by a subsequent law; and the claim that such subsequent law took property without due process of law refers only to that property right which it claimed to have in the contract. If it had such a contract, and it were irrevocable and unchangeable under the Constitution and laws of Illinois, in force when it was entered into, then his conclusion would be correct; but if it had a contract at all, and it was made without power it was void; or, if made with power but with the right reserved, either by Constitution or special or general law to modify or repeal, it may be modified or repealed at any time and does not create an irrevocable contract.

Respectfully submitted,

JESSE B. BARTON,
Attorney for Defendant in Error.

It is not claimed that the rates fixed by the ordinance of 1897 are lower than what is reasonable and just, and must, therefore, be presumed to be reasonable and just, and as the consumer is entitled, statute or no statute, ordinance or no ordinance, to water at reasonable and just rates, the excess is not the property of the plaintiff in error, and depriving it of such excess is not the taking of property.

No. 56.

Term No. 56

Supreme Court
FILED
OCT 12 1900
JAMES H. McKENNEY
Clerk

Sup. Ct. Br. of Barton for D.

Filed Oct. 12, 1900.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

ROGERS PARK WATER COMPANY,
Plaintiff in Error,

vs.

JOHN S. FERGUS,
Defendant in Error.

} ERROR TO SUPREME COURT OF ILLINOIS.

Supplemental Brief for Defendant in Error.

JESSE B. BARTON,
ATTORNEY FOR DEFENDANT IN ERROR.

CHICAGO:
FERGUS PRINTING COMPANY.
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Supplemental Brief for Defendant in Error.

MAY IT PLEASE THE COURT:

The Supreme Court of Illinois in its opinion in this case stated: "A rate or price reasonable or just when "fixed may, in the future, become so unreasonably high "that the exaction of such rate or price is but an extor- "tion. The duty of the corporation does not, however, "change but remains the same—that is, to exact only "reasonable compensation. The power of the State to "enforce that duty is not exhausted by its exercise in the "first or any subsequent instance, but is continuous, and "may be exerted from time to time, whenever necessary "to prevent extortion by the agency created by the State "to serve the public."

It is the exercise of the police power to prevent extortion which was exercised in this case and which it is claimed impaired the obligation of a contract.

Under the common law extortion committed by public

officers was a crime, and by statutes it has been extended to cover the offense of demanding unwarranted charges by quasi-public corporations involving the safety and the welfare of the people.

In N. O. Gas Co., vs. La. Light Co., 115 U. S., 650, 672, this Court said: "whatever, therefore, in the manufact-"ure of gas in the City of New Orleans, proves to be "injurious to the public health, the public comfort or the "public safety, may, notwithstanding the exclusive grant "to plaintiff, be prohibited by legislation, or by munici-"pal ordinance passed under legislative authority. It "can not be said with propriety, that to sustain that "grant is to obstruct the state in the exercise of the "power to provide for the public protection, health, and "safety."

In the case at bar, no attack is made on the grant to construct and maintain water works for a specified period. It is only claimed by defendant in error that the legislature having considered the changed conditions, or having considered that the conditions have changed, retained and exercised the power to protect the public against present extortion.

In R. R. Co. vs. Omaha, 170 U. S., 57, 72, the Court lays down the rule, applicable to this class of cases, as follows: "Usually, where a contract not contrary to pub-"lic policy has been entered into between parties compe-"tent to contract, it is not within the power of either "party to withdraw from its terms without the consent "of the other; and the obligation of such a contract

"is constitutionally protected from hostile legislation. "Where, however, the respective parties are not private "persons, dealing with matters and things in which the "public has no concern, but are persons and corporations "whose rights and powers were created for public pur- "poses, by legislative acts, and where the subject matter "of the contract is one which affects the safety and well- "fare of the public, other principles apply. Contracts of "the latter description are held to be within the super- "vising power and control of the legislature when exer- "cised to protect the public safety, health, and morals, "and that clause of the Federal Constitution which pro- "tects contracts from legislative action can not in every "case be successfully invoked. The presumption is that "when such contracts are entered into it is with the "knowledge that parties can not, by making agreements "on subjects involving the rights of the parties, with- "draw such subjects from the police power of the legis- "lature."

In this case the rights and powers created and vested in Keeler, assignor to plaintiff in error, were created for public purposes by a legislative act. The subject matter of the contract is one which affects the welfare of the public. This contract is, therefore, within the supervising power of the legislature, and is not protected by the clauses of the Federal Constitution invoked by plaintiff in error.

The principle was applied in N.-W. Fertilizing Co. vs. Hyde Park, 97 U. S., 659, to protect the public against offensive sights and smells, and possibly unhealthy ones.

So in the Chicago Lake Front cases it was held that a contract which took from the public the control of the harbor and hampered it in its rights of fishery and navigation were revocable.

So in Beer Co. vs. Massachusetts, 97 U. S., 25, to protect the public against the evil effects of inebriety, charter rights could be invaded; while in Stone vs. Miss., 101 U. S., 814, a charter right to carry on a lottery scheme was held to be a mere license and revocable at will whenever the legislature should determine that morals, health, or safety of the public were menaced.

In none of the cases above cited is there such cogent reason for applying the rule laid down in the Gas case as in the case at bar.

In the Hyde Park case, it was an admitted fact that those who might be affected by the operation of the business of the fertilizing company had voluntarily entered the neighborhood after that business was opened.

In the Beer case, a sumptuary law was sustained, an exercise of the police power long in doubt and still strongly opposed as inconsistent with a republican government.

In the Lottery case, a law of a class very nearly allied to the sumptuary laws was sustained; while in the Lake Front cases that was condemned as an incident which has been sustained as a direction, namely, the grant in fee of submerged lands covered by the shallow waters of navigable lakes and the seas.

In the case at bar, however, the legislation which is claimed to be unconstitutional was to protect the people of Rogers Park against extortionate charges for an absolute necessity of life, that without which man can not live.

Respectfully submitted,

JESSE B. BARTON,

Attorney for Defendant in Error.

Supreme Court of the United States.

No. 56.—October Term, 1900.

The Rogers Park Water Company, Plaintiff in Error, vs. John B. Fergus. } In error to the Supreme Court of the State of Illinois.

[March 25, 1901.]

This is a petition for a writ of mandamus which was brought by the defendant in error on the 13th of December, 1897, in the circuit court of Cook County, State of Illinois, against the plaintiff in error, to compel it to furnish him water at rates fixed by an ordinance enacted by the city of Chicago.

The defense is that such ordinance impairs the obligation of the contract which plaintiff in error claims to have with the village of Rogers Park before its annexation to the city of Chicago, as hereinafter mentioned.

The village of Rogers Park was from November 12, 1888, and until April 4, 1893, a municipal corporation organized under the laws of Illinois. At the latter date it was annexed to the city of Chicago.

The Rogers Park Water Company, plaintiff in error, was a corporation, incorporated about the 24th of January, 1889, under the laws of Illinois, to construct and operate a system of waterworks in the village of Rogers Park, and to acquire such property and exercise the powers necessary thereto.

The company constructed and operated a system of waterworks in said village, and the premises of the defendant in error were connected thereto and supplied with water therefrom. The rates for such water under the ordinance of the city of Chicago were $8.72, payable in advance, for the current half-year, from November 1, 1897, to May 1, 1898. Those rates were tendered to the company, and a supply of water demanded of it. The company refused to comply, demanding $13.50 for such supply, claiming that sum under section 12 of an ordinance of the village of Rogers Park before its annexation to Chicago, and which ordinance empowered the construction of the waterworks system.

The contract, which plaintiff in error claims, is based on that ordinance. It was passed November 12, 1888, and was entitled "An ordinance to provide for a supply of water to the village of Rogers Park, Ill., and its inhabitants, contracting with H. E. Keeler, his successors and assigns, for a supply of water for public use, and giving the said village of Rogers Park, Ill., an option to purchase the said works."

It was provided that in consideration of the public benefit to be derived therefrom the village of Rogers Park, Illinois, granted the exclusive right and privilege for a period of thirty years from the time the ordinance should take effect "unto H. E. Keeler, his successor and assigns, of erecting, maintaining and operating a system of waterworks in accordance with the terms and provisions" of the ordinance. There was a grant of the use of the streets and alleys for mains and conduits, and power given to extend the system to new territory, if any should be acquired by the village. There were provisions prescribing the character of the system to be constructed, and that the village should pay "an annual rental for fire protection, for less than five miles of mains within the corporate limits of said village, for the aforesaid period of thirty years, at the rental rate of five hundred and seventy-five ($575) dollars for each mile of main, to be payable semiannually." There were also provisions for payment of taxes by the company, the flushing of sewers, and the maintenance of fountains, for the supply of water to the inhabitants, the quality of water and the manner of the supply before prescribed, and for the acceptance in writing by the company of the terms of the ordinance. Provision was also made for the purchase of the system by the village.

Section 12 was as follows:

"The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water-meter into the service pipe of any consumer and to charge and collect from him at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be five dollars."

Then follow the rates for the particular purpose for which the water might be used.

Section 13 provided for the levy of a tax to meet the payments stipulated by the ordinance, which should be irrepealable.

Section 14 was as follows:

"Within sixty days after the passage of this ordinance said H. E. Keeler, his successors and assigns, shall file with the village an acceptance of the same, which acceptance, duly acknowledged before some officer duly authorized to administer oaths, shall have the effect of a contract between the village and said H. E. Keeler, his successors or assigns."

The plaintiff in error is the assignee of Keeler.

The plaintiff in error claimed in its answer that said ordinance of the village of Rogers Park constituted a contract with plaintiff in error by which it had the right to charge the rates contained in section 12, and that the ordinance of the city of Chicago reducing their rates impaired such contract and violated not only the constitution of the State of Illinois, but also violated section 10, article 1, of the Constitution of the United States, as well as the Fourteenth Amendment.

One of the defenses of the plaintiff in error was that the premises of defendant in error was connected with the system by reason of his written application, which application was accepted and became a contract. The defense, however, is not made in this court, and further reference to it is omitted.

There was a demurrer filed to the answer of the plaintiff in error, which set up its defenses under the Constitution of the United States. The demurrer was sustained. Certain issues of fact were made on other pleadings, upon which there was a trial by jury, resulting in a verdict for petitioner and judgment on the verdict. The judgment was affirmed by the Supreme Court of the State, (178 Ill. 571,) and this writ of error was sued out. The assignments of error present constitutional questions only.

Mr. Justice McKenna, after making the above statement, delivered the opinion of the Court.

At the time of the passage of the ordinance of November, 1888, by the village of Rogers Park, counsel for plaintiff in error says "two general acts were in force in Illinois, which related to the power of municipalities to pass ordinances for waterworks to be built and operated by private enterprise." The first is as follows:

"An act entitled 'An act to enable cities, incorporated towns and villages to contract for a supply of water for public use, and to levy and collect a tax to pay for the water so supplied.' (Approved April 9, 1872. In force July 1, 1872. L. 1871–2, p. 271. This title is as amended by act approved June 26, 1885, in force July 1, 1885, p. 64.)

"Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That in all cities, incorporated towns and villages where waterworks have been or may hereafter be constructed by any person or incorporated company, the city, town or village authorities in such cities, incorporated towns and villages may contract with such person or incorporated company for a supply of water for public use for a period not exceeding thirty years." (As amended by act approved June 30, 1885. In force July 1, 1885, L. 1885, p. 64.)

"Sec. 2. Any such city or village so contracting may levy and collect a tax on all taxable property within such city or village for the water so supplied."

The second, passed one day later and taking effect on the same day as the first, was the cities, villages and towns act. The title to that act and the article and section bearing upon this case are as follows:

"An act entitled 'An act to provide for the incorporation of cities and villages.' (Approved April 10, 1872. In force July 1, 1872. Laws of 1871–2, p. 218.)

"Article X, Section 1. The city council or board of trustees shall have the power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps,

cisterns, reservoirs or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not to exceed thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or waterworks."

These acts are urged to establish the power in the village of Rogers Park to grant to the plaintiff in error the right to charge and collect for thirty years the rates prescribed by the ordinance of November, 1888. We have passed on a similar contention in *Freeport Water Co.* v. *Freeport*, and in *Danville Water Co.* v. *Danville*, and we need not repeat the reasoning. Besides, it is disputable if the ordinance of 1888 justifies the claim of plaintiff in error. The Supreme Court of the State held that it did not. A strict construction must be exercised. The contract claimed concerned governmental functions, and such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions.

Section 1 of the ordinance recites "that in consideration of the public benefit to be derived therefrom the village of Rogers Park, Illinois, hereby grants the exclusive right and privilege for a period of thirty years . . . unto H. E. Keeler, his successor or assigns," of erecting and maintaining a system of waterworks. The use of the streets was also granted for such purpose.

Section 3 recites "in consideration of the public benefits and the protection of property resulting from the construction of said system of waterworks," the village agrees to pay a certain annual rental proportional to the length of the mains.

The grantee, on his part to pay "all municipal and village taxes," (sec. 3,) "in consideration of the rentals herein agreed to be paid and in consideration of the rights and privileges granted," (sec. 4,) agreed to furnish the vilage and the residents thereof an adequate supply of water. Failing to supply water for a year in quantity or quality stipulated, the "franchise and all their rights and privileges granted under this ordinance, and the contract entered into, shall be null and void."

If the ordinance contained any other provisions it could not be claimed that the company's charges to consumers of the water furnished them were free from regulation by the municipality if it otherwise had power of regulation. There are other provisions, and especial stress is laid upon them. Section 12 provides as follows:

"The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer and to charge and collect from him at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be five dollars."

Then follows an enumeration of uses and the rates for such uses. There is a schedule for meter rates, and also the following provision:

"Rates for all other purposes that may be applied for, not named in the foregoing schedule of maximum rates, will be fixed by estimation or meter, at the option of the grantee or assigns."

This, it will be observed, is the language of command, not of contract; of limitation on power, not a bargain giving power. The right to charge the inhabitants of the village for the water supplied to them resulted from the right to construct and maintain the system. Section 12 was a regulation of the right. There is no stipulation that it will be the only instance of regulation; that the power to do so is bartered away, and that the conditions which determined and justified it in 1888 would remain standing, and continue to justify it through the changes of thirty years. It would require clearer language to authorize us in so holding. The predecessor of the plaintiff in error was given the monopoly of the supply of water. That might be necessary to induce the investment of capital, and for its security the obligation of a contract might be sought and given. There was no such inducement for an unalterable rate. A reasonable rate the law assured, and assured even against governmental regulation. And the statute of 1891, which is especially complained of, assures it. By section 1 of that statute municipalities are "empowered to prescribe by ordinance maximum rates and charges," and if unreasonable rates and charges be fixed they may be renewed and determined by the circuit court of the county in which the municipality may be. There is no complaint in this case that the rates fixed by the ordinance of 1897, passed by the city council of Chicago, were unreasonable. Plaintiff in error relies strictly on a contractual right. We think it has no such right, and the judgment of the Supreme Court is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

7500

Supreme Court of the United States.

No. 56.—October Term, 1900.

The Rogers Park Water Company, Plaintiff in Error, *vs.* John B. Fergus. } In error to the Supreme Court of the State of Illinois.

[March 25, 1901.]

Mr. Justice White, with whom concurs Mr. Justice Brewer, Mr. Justice Brown and Mr. Justice Peckham, dissenting.

This case, in my opinion, should be controlled by the same principles which it seemed to me should have been applied in the case of the *Freeport Water Company* v. *City of Freeport*, just decided. The only difference of fact between that and the present one is this: In the Freeport case the matter involved was the power of the city to contract and to fix the rates to be paid for a supply of water for public use during the designated period. Here the question is whether the city of Rogers Park had power to contract for the construction and maintenance of waterworks, and in such contract to fix the rates to be charged for the water to be supplied to private consumers during the contract period.

The authority under which the contract in question was made was the two acts of the legislature of the State of Illinois considered in the Freeport case, that is to say, the acts of April 9, 1872, and April 10, 1872. There is this difference, however: The act of April 9, 1872, was amended on June 26, 1885, (Public Laws of Illinois, 1885, p. 64,) so as to authorize contracts for a supply of water as therein stated to be made with private individuals as well as private corporations. Thus authority existed to contract with individuals under both acts. The ordinance passed by the city of Rogers Park and the contract made as fully recited in the opinion of the court was for the erection, maintenance and operation of waterworks, the extension of the system as might be required, the payment of an annual rental by the city for public hydrants, and the establishment of the rates to be paid by private consumers during the contract period.

The language of the legislative act conferring authority to fix the rates, it seems to me, clearly sanctions the establishment by contract of the rates for private use as it did those to be paid for the public supply. The fixing of rates is plainly generic and of necessity embraced those rates which were to be paid for the supply of water which the statute authorized

the city to contract for. So far as the power of the legislature to authorize a contract for designated rates for a stipulated time is concerned, I can see no difference between fixing the rates for the public and those for the private supply during the authorized time. This in my judgment is conclusively settled by the authorities to which reference was made in my dissent in the Freeport case. Especially is this shown by the ruling of the court in *Los Angeles* v. *Los Angeles City Water Co.*, (177 U. S. 569,) where it was, in effect, decided that a contract, made by a municipality with a water company that existing rates to private consumers should not be reduced during the life of the contract was a valid stipulation, provided that the action of the city was previously sanctioned or was subsequently ratified by legislative authority.

The only question then remaining to be examined seems to me to be whether the particular contract made by the city of Rogers Park, considered in this case, fixed the rates for private consumers for the period of the contract. And this only involves an examination of the contract for the purpose of determining its import. Of course, it is conceded, under the rule of construction stated by me in my dissent in the Freeport case, that if doubt arises from an analysis of the provisions of the contract, that doubt must be solved against the water company and in favor of the municipality. But it is submitted that there can be no doubt, from a consideration of the text of the contract, that it fixed the rates to be paid by private consumers during the life of the contract. The ordinance established in detail a tariff of specific water rates for private purposes, embracing an enumeration which would seem to include every variety of use. It conferred upon the contractor the right, if he did not choose to charge these rates, to insert in the connection a water meter, and to charge for the water supplied at meter rates instead of at the aggregate sum otherwise fixed. The opening clause of section 12 read as follows: "The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer, and to charge and to collect from them at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be five dollars." As I understand this language, it without doubt embodies the rates, whether fixed by the purpose for which the water was taken or by the meter measurement, and explicitly stipulates that these rates may be charged during the life of the contract. Indeed, it seems to me impossible to conceive that the contract for the construction, maintenance and supply would have been entered into without such agreement. Can it, in reason, be said, in view of the terms of the contract, that if the water company had wished to charge more than the contract price, on the ground that an unreasonably

low sum had been fixed in the contract, that it would have had a right at once to ignore the contract stipulation and exact higher rates? If it cannot be, how can it be held that the city had the right at its pleasure to disregard the rates fixed in the contract? Was not the obligation of one the correlative of the right of the other? To say that the provisions of the contract constitute the language of command and not the language of contract, does not weaken or obliterate the unambiguous provisions of the agreement into which the parties entered. They were indeed, in my judgment, commands, arising from the express authority conferred upon the municipality by the legislature of the State of Illinois, sanctioned by the agreement of the parties, and protected from impairment by the Constitution of the United States.

True copy.

Test:

Clerk Supreme Court, U. S.

END OF CASE